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# **PRINCIPLES OF JURISPRUDENCE**



# **THE PRINCIPLES OF JURISPRUDENCE**

**Dr. VIDYA DHAR MAHAJAN,**

*M.A. (Hons.), Ph. D., L.E.B.*

*Author of English Constitutional Law,  
International Law, Constitution of  
India, Sale of Goods Act, etc.*

*Foreward by*

**M. C. SETALVAD**

*Attorney General of India*

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## PREFACE TO THE SECOND EDITION

I have great pleasure in placing the second edition of the book in the hands of the readers. The book has been thoroughly revised. It has grown not in volume but also in utility. A large number of topics have been added in the new edition. This particularly applies to the new material on Bentham, John Austin, Sir Henry Maine, Ihering, Duguit, Ehrlich, Justice Holmes, Roscoe Pound, Justice Cardozo, Cairns, Hans Kelsen, Marx, Prof. Llewellyn, Hagerstrom, Petrazhitsky, Prof. Olivecrona, Natural law, Law and equity; growth of justice, capital punishment, rules of interpretation of statutes, judges as law-makers, *stare decisis*, crime and tort, exemptions from criminal liability and theories of property. A list of Suggested Readings has been given at the end of every chapter for further readings on the subject.

The author hopes that the new edition will serve the needs of all students of jurisprudence.

III—M/10,  
Lajpat Nagar,  
New Delhi.  
November 1, 1962. }

VIDYA DHAR MAHAJAN

## PREFACE TO THE FIRST EDITION

Everything must progress in free India. Even the much-maligned study of law must be given the due place it rightly deserves. Our politicians must stop condemning the lawyers and the study of law, for the advancement of civilization and law go together. As a matter of fact, they must make amends for their mistakes of commission and omission. The study of law should be patronised and every facility should be given to those who can and are eager to pursue the advanced study of any branch of law. While the State should come forward with funds, it is the duty of the Hon'ble Judges of the Supreme Court of India and the various High Courts to make their respective contributions to the study of law. The learned members of the Bar in India should also take pride in advancing the cause of the study of law by their invaluable experience. They must not be selfish and keep all knowledge of law to themselves. They should be happy to share the same with all those who are seekers after knowledge of law. The teachers of law in this country must not lag behind. Every one should devote himself whole-heartedly to the subject and must make it a point to make some substantial contribution on some aspect of law. If we all pull together, the study of law is bound to make progress in this country.

The object of this book is to explain the principles of jurisprudence as clearly as possible and it is hoped that the readers will benefit immensely by a thorough study of the same. I have drawn largely on the works of Salmond, Keeton, Markby, Pollock, Allen Austin, Holland, Paton, Gray, Dean Pound, Hibbert, Bentham, Maine and others and I am greatly indebted to all of them. For the guidance of those who would like to do more reading on the subject, I have added a Select Bibliography towards the end of the book. Questions for Revision will also be found handy and useful.

All suggestions for the improvement of the book in the next edition shall be gratefully accepted and acknowledged.

105-E, Kamlanagar, }  
Delhi.  
August 15, 1955 }

VIDYA DHAR MAHAJAN

## FOREWORD

I am happy to be able to introduce this book to the reader.

We have few practising lawyers in our country who interest themselves in an academic study of law and legal principles. Those who do write on legal subjects produce commentaries on our Acts or epitomes of our uncodified law. It is therefore refreshing to find the author dealing with a subject like jurisprudence which deals with fundamental principles underlying all law.

The study of jurisprudence by our law students has evoked a great deal of controversy. There are some who take the view that the study of a subject so abstract can be usefully prescribed only as a part of the advanced courses of legal studies. Others take the view that an intelligent approach to the study of all law, whether statute law or uncodified law, is possible only if it is preceded by a knowledge of what law is, how it arose and the basic principles which underlie most systems of law. Whichever be the correct view it is obvious that a writer who attempts to collate and explain the fundamentals which underlie legal systems generally renders a useful service to legal learning.

The treatise of the author of which I have seen the first print seems to me to be a comprehensive collection of the views of distinguished jurists on basic legal principles arranged under appropriate heads. A useful feature of the publication is the invitation to the reader who feels interested in any particular head of jurisprudence to enter upon its research and study on his own by delving into standard works on the subject which are enumerated at the end of each chapter under the head 'Suggested Readings'.

I trust the book will be useful not only to students in legal institutions, but that it will reach the wider circle of academic and practising lawyers and other interested in law.

M. C. SETALVAD,

Attorney General of India.

20.11.62.

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## CHAPTER I

### NATURE AND SCOPE OF JURISPRUDENCE

#### **Importance of the Study of Jurisprudence<sup>1</sup>**

The importance of the study of jurisprudence cannot be over-emphasised. It is absolutely essential not only for students of law but also for the practising lawyers. The study of jurisprudence enables the students of law to understand the exact meaning of the legal terms and thereby avoid loose thinking and confusion. Jurisprudence is to law as grammar is to language. As a sound knowledge of grammar is necessary for understanding a language, the same is the case with jurisprudence so far as the students of law are concerned. A thorough knowledge of jurisprudence is bound to create a better understanding of law. If we aim at the growth of the study of law, we must put due emphasis on the study of jurisprudence. It has rightly been stated that jurisprudence is the eye of law.

In all difficult questions of law before the highest courts, a knowledge of jurisprudence is very helpful. Both the judges and lawyers are likely to bungle and lay down bad law if they do not have a grasp of jurisprudence.

The same can be said about legislators. There may not be any accuracy in legal phraseology and that may result in endless litigation. Such a situation has to be avoided at all costs. If those who are entrusted with the task of drafting legislation have a good grasp of the fundamentals of jurisprudence, society is bound to profit thereby.

According to Holland, "Just as similarity and differences in the growth of different languages are collected and arranged by comparative philology and the facts thus collected are the foundations of abstract grammar, so comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth orderly view of the ideas and methods which have been variously realised in actual system."

According to Vinogradoff, "In contrast to the simple rules and divisions of positive law which strike across the history of all nations, there arises a science of law, a jurisprudence, which aims

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1. According to Dr. Julius Stone, "A book on jurisprudence is not a textbook on the law itself and there is no need for the analyst to waver with Holland between the urge to incorporate the latest decision and the aspiration to have said the last word about the logical principles of the legal system." (p. 73, *The Province and Function of Law*).



at discovering the general principles underlying legal enactments and judicial decisions. It speculates on the processes of thought which take place in the minds of legislators, judges, pleaders and parties. This theory of law enables men to frame and use their laws deliberately and scientifically instead of producing them more or less at random under the stress of circumstances. The study of jurisprudence is, therefore, by no means a mere expedient and the schools, contrived in order to introduce beginners to the terms and principal distinctions of their art, though, of course, jurisprudence does help in this respect while no its way towards the solution of the scientific problems. Nor does our study exist chiefly for the purpose of classifying and cataloguing, scattered notices as to rule and remedies. The most perfectly systematized chapters and paragraphs of a code would not render a general theory of law superfluous, for the prime consideration is not so much to establish the sequence of laws as to discover rational inter-dependence and ultimate significance. For the intricate maze of common law which, like the Anglo-American, is based on the judicial decisions, the help rendered by the jurisprudential classifications is especially welcomed, nay necessary; but even apart from that, a theory of jurisprudence is needed to strengthen and complete scattered arguments by treating them as parts of a coherent body of legal thoughts. Observations and rules which may seem casual and arbitrary when memorialized for practice obtained their justification or call forth criticism when examined in the light of a general theory."

### Definition of Jurisprudence

The term jurisprudence is derived from the Latin word 'Jurisprudentia.' The term 'Juris' means law and 'prudentia' means science or a systematic body of knowledge. Thus, etymologically, *jurisprudence means the science of law.*

Many definitions of jurisprudence have been given by various writers and it is desirable to refer to some of them.

(1) According to *Salmond*, "In a generic and primary sense jurisprudence includes the entire body of legal documents. It is *Jurisprudentia*—the knowledge of law—and in this sense all law books are books of jurisprudence. By law in this connection is meant exclusively the civil law, the law of the land, as opposed to those other bodies of rules to which the name of law has been extended by analogy. If we use the term science in its widest permissible sense as including the systematized knowledge of any subject of intellectual enquiry, we may define jurisprudence as the science of civil law."

*Salmond* gives two meanings to jurisprudence, one in the widest sense and the other in the narrow sense. In the widest sense, jurisprudence is "the science of civil law". It is a science

and not an art. It is the law of the land, the law of the lawyers and law-courts. It is confined only to those rules which are enforced by the courts. There are three branches of jurisprudence in this sense, *viz.*, legal exposition, legal history and science of legislation. Legal exposition means the actual contents of a particular legal system as it exists today or as it has existed in the past. Legal history deals with the various stages through which law has passed. Science of legislation means the study of law as it ought to be in the future in an ideal state or as it has been in the past.

In its narrow sense, jurisprudence is the science of the first principles of civil law. It deals with the abstract principles of law which are basic in a legal system. It is a well-considered and profound knowledge of the ultimate principles which underlie specific and concrete provisions of law.

It is pointed out that the definition of Salmond is sufficient and complete. He avoids the use of such terms as formal and positive law and concentrates on the first principles of civil law.

(2) According to *Keeton*, "The science of jurisprudence may now be considered to be the study and systematic arrangement of the general principles of law. Thus, jurisprudence considers the elements necessary for the formation of a valid contract but it does not attempt to enter into a full exposition of the detailed rules of the law and contract, either in English law or in other systems. It analyses the notion of status and considers the most important examples; but it does not consider exhaustively the points in which persons of abnormal status differ from ordinary persons. Again, jurisprudence deals with the distinction between the public and private laws and considers the content of the principal departments of the law." (*The Elementary Principles of Jurisprudence*, pp. 1-2).

(3) According to *Pound*, "Jurisprudence is the science of law, using the term law in the juridical sense, as denoting the body of principles recognized or enforced by public and regular tribunals in the administration of justice.

(4) According to *Gray*, jurisprudence is "the science of law, the statement and systematic arrangement of the rules followed by the courts and the principles involved in those rules."

(5) According to *Lee*, jurisprudence "is a science which endeavours to ascertain the fundamental principles of which the law is the expression. It rests upon the laws as established facts; but at the same time it is a power in bringing law into a coherent system and in rendering all parts thereof subservient to fixed principles of justice."

(6) According to *Clark*, jurisprudence is the science of law in general. It does not confine itself to any particular system of law but applies to all the systems of law or to most of them. It gives the general ideas, conceptions and fundamental principles on which all or most of the systems of laws of the world are based. According to *Austin*, jurisprudence is the philosophy of positive law. According to *Holland*, it is the formal science of positive law. According to *Ulpian*, jurisprudence is the "knowledge of things human and divine, the science of the just and the unjust." According to *Cicero*, jurisprudence is the "philosophical aspect of the knowledge of law." According to *Allen*, "jurisprudence is the scientific synthesis of all the essential principles of law." According to *Paton*, "jurisprudence is a particular method of study, not of the law of one country, but of the general notion of law itself. It is a study relating to law."

According to *Dias and Hughes*, "Jurisprudence today is thus envisaged in an immeasurably broader and more sweeping sense than that in which Austin understood it. Buckland described the change vividly. 'The analysis of legal concepts', he says, 'is what jurisprudence meant for the student in the days of my youth. In fact it meant Austin. He was a religion; today he seems to be regarded rather as a disease. He cannot be replaced on his pedestal; the intensely individualistic habit of mind of his day is out of fashion.' At the present jurisprudence may tentatively be described as any thought or writing about law, other than a technical exposition of a branch of the law itself. So, if X writes a book about the economic effects on the families of convicted prisoners on their convictions, this could be called a contribution to jurisprudence. If Y writes a book on theories of justice in the ancient world, this too would be a contribution to jurisprudence. If Z described how the development of English case law is governed by the psychology of the judges, this would also fall within the scope of our subject. Sometimes qualifying adjectives are tacked on to the noun, so that X's book might be called a study in 'Economic Jurisprudence', Y's book an example of 'Philosophical Jurisprudence', and Z's book one on 'Psychological Jurisprudence'; but, with or without the qualifying adjectives, it would be within the modern sense of the word to describe all three books as being works of jurisprudence." (Pp. 3-4 Jurisprudence).

According to *Dr. Julius Stone*, "Jurisprudence, then, in the present hypothesis, is the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law. It is an attempt, which must always remain imperfect, to fulfil for the law the object strikingly posed by the late Mr. Justice Holmes of showing 'the rational connection between your fact and the frame of the Universe. To be master of any branch of knowledge you must master those which lie next to it.' " (P. 25, *The Province and Function of Law*.)

**Holland's Definition of Jurisprudence**

According to Holland, jurisprudence is "the formal science of positive law". It is a formal or analytical science rather than a material science. The term positive law has been defined by Holland as "the general rule of external human action enforced by a sovereign political authority." Holland follows the definition of Austin but he adds the term 'formal' which means 'that which concerns only the form and not its essence.' A formal science is one which describes only the form or the external side of the subject and not its internal contents. Jurisprudence is not concerned with the actual material contents of law but with the fundamental conceptions of law. Holland came to the conclusion that jurisprudence was not a material science but merely a formal science. To quote him, "The assertion that jurisprudence is a general science may perhaps be made clearer by an example. If any individual should accumulate a knowledge of every European system of law, holding each part from the rest in the chambers of his mind, his achievements would be best described as an accurate acquaintance with the legal system of Europe. If each of these systems were entirely unlike the rest except when the laws had been transferred in the course of history from one to the other, such a distinguished jurist could do no more than endeavour to hold fast and to avoid confusing the heterogeneous information of which he had become possessed. Suppose, however, as is the case, that the laws of every country contain a common element; that they have been constructed in order to effect similar objects, and involve the assumption of similar moral phenomena as everywhere existing; then such a person might proceed to frame out of his accumulated materials a scheme of the purposes, methods and ideas common to every system of law. Such a scheme would be a formal science of law, presenting many analogies to grammar, the science of those ideas of relation which, in greater or less perfection, and often in the most dissimilar ways, are expressed in all the languages of mankind. Just as similarities and differences in the growth of different languages are collected and arranged by comparative philology and the facts thus collected are the foundations of abstract grammar, so comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems. It is, for instance, the office of comparative law to ascertain what have been at different times and places the periods of prescription or the requisites of a good marriage. It is for jurisprudence to elucidate the meaning of prescription in its relation to ownership and to actions; or to explain the legal aspects of marriage and its connection with property and the family. We are not indeed to suppose that jurisprudence is impossible unless it is preceded by comparative law. A system of jurisprudence might conceivably

be constructed from the observation of one system of law only, at one epoch of its growth." Again, "Jurisprudence is therefore not the material science of those portions of the law which various nations have in common, but the formal science of those relations of mankind which are generally recognized as having legal consequences." Jurisprudence "deals rather with the various relations which are regulated by legal rules than with the rules which themselves regulate those relations."

### Criticism

Holland's definition of jurisprudence is criticised on the ground that it is narrow and cryptic. It is pointed out that jurisprudence is not only a formal science but also a material science. According to Gray, "Jurisprudence is, in truth, no more a formal science than physiology. As bones and muscles and nerves are the subject-matter of physiology, so the acts and forbearances of men and the events which happen to them are the subject-matter of jurisprudence and physiology could as well dispense with the former as jurisprudence with the latter." Again, "The real relation of jurisprudence to law depends upon not *what* law is treated but *how* law is treated. A treatise on jurisprudence may go into the minutest particulars or be confined to the most general doctrines and in either case deserves its name; what is essential to it is that it should be an orderly, scientific treatise in which the subjects are duly classified and subordinated."

According to Jenks, "Can jurisprudence be truly said to be a purely formal science? Not, it is submitted, unless the word 'formal' be used in a strained and artificial sense. It is true that a jurist can only recognize a law by its form; for it is form which, as has been said, causes the manifold matter of the phenomena to be perceived. But the jurist, having got the form as it were, on the operating table, has to dissect it and ascertain its meaning. Jurisprudence is concerned with means rather than with ends, though some of its means are ends in themselves. But to say that jurisprudence is concerned only with forms, is to degrade it from the rank of a science to that of a craft." It is pointed out that there is a confusion in the argument of Jenks because he does not make any distinction between a formal science and a formalistic manner of its approach. Holland does not say that jurisprudence is concerned merely with forms. What he says is that jurisprudence deals in a formal or abstract manner with those relations of mankind which are generally recognized as having legal consequences.

According to Adamson, "The notions of form and formal relations are by no means so simple and free from ambiguity that by their aid one can at once solve a complicated problem of philosophic arrangement."

## General and Particular Jurisprudence

Austin refers to two aspects of jurisprudence, general and particular. By general jurisprudence, he means the philosophy of positive law and by particular jurisprudence he means the science of particular law or the science of any system of positive law prevailing in any country. General jurisprudence is concerned with the study of those fundamental principles which are common to the different systems of laws prevailing in various countries. Particular jurisprudence is concerned with the underlying principles of the legal system of a particular country. To quote Austin, "The proper subject of general or universal jurisprudence is a description of all such subjects and ends of laws as are common to all systems and of those resemblances between different systems which are bottomed in the common nature of men or correspond to the resembling point in those several portions." Again, "Particular jurisprudence is the science of any actual system of law or of any portion of it. The only practical jurisprudence is particular."

Salmond and Holland criticize Austin's division of jurisprudence into general and particular parts. According to Holland, in the particular jurisprudence of Austin, it is only the material which is particular and not science itself. The study of a particular legal system is not a science. Giving the example of geology of England, Holland points out that it is not distinct from general geology. To quote him, "A science is a system of generalizations which, though they may be derived from observation over a limited area, will hold good everywhere assuming the subject-matter of the science to possess everywhere the same characteristics." Again, "Principles of geology elaborated from the observation of England alone hold good all over the globe in so far as the same substances and forces are everywhere present and the principles of jurisprudence, if arrived at entirely from English data, would be true if applied to the particular law of any other community of human-beings, assuming them to resemble in essentials to the human-beings who inhabited England."

Holland's criticism is based on the assumption that law has the same characteristics all over the world but this is opposed to human experience. According to Maitland, "Races and nations do not travel by the same roads and at the same rate." According to Bryce, "The law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions." According to Buckland, "Law is not a mechanical structure like geological deposits; it is a growth and its true analogy is that of biology." According to Savigny, "Law grows with the growth and strengthens with the strength of people and its standard of excellence will generally be found

at any given period, to be in complete harmony with the prevailing ideas of the best class of citizens." According to Puchta, "The progress in the formation of law accordingly keeps pace with the progress in the knowledge of the people of the facts which they observe and hence it is that law has its provincialisms no less marked than language."

According to Salmond, the error in Austin's idea of general jurisprudence lies in the fact that he assumes that unless a legal principle is common to many legal systems, it cannot be dealt with in general jurisprudence. There may be many schools of jurisprudence but there are not different kinds of jurisprudence. Jurisprudence is one integral social science. The distinction between general and particular jurisprudence is not proper. It is not proper to use such terms as Hindu jurisprudence, Roman jurisprudence or English jurisprudence. Actually what we are dealing with are not the different kinds of jurisprudence but the different systems of law. It is more appropriate to use the term jurisprudence alone without any qualifying epithet. Jurisprudence is a social science which deals with social institutions which are governed by law. It studies them from the point of view of their legal significance.

### **Theoretical and Practical Jurisprudence**

Theoretical jurisprudence is concerned with the fundamental, abstract or general ideas underlying civil law. Practical jurisprudence is concerned with the concrete branches of legal study. It deals with the concrete provisions of particular laws. Theoretical jurisprudence is concerned with the theory of legal science. It is also known as the philosophy of law, general jurisprudence or jurisprudence simpliciter.

### **Subject-matter of Jurisprudence**

The subject-matter of jurisprudence is law and law alone. Jurisprudence is concerned with the genesis, growth, functions and end of positive law. It is the function of a jurist to study the fundamental principles on which law is based. It is for him to explain the basis of the theory of punishment. According to Austin, "The appropriate subject of jurisprudence in any of its different departments is positive law; meaning by positive law, law established or *positum* in an independent political society, by the express or tacit authority of a sovereign or supreme government."

According to Beale, jurisprudence is "the science of justice." According to Ulpian, the Roman jurist, jurisprudence is "the knowledge of things human and divine, the science of the just and unjust." According to Austin, jurisprudence is not concerned with the goodness or badness of law. To quote

him, "With the goodness or badness of laws as tried by the test of utility, it has no immediate concern." Jurisprudence is concerned with abstract justice. According to Lightwood, it is "the science of the attainment of justice by means of rules of law."

### **Schools of Jurisprudence**

There are many schools of jurisprudence and that is due to the fact that the subject has been studied by jurists from different points of view and by following different methods. The various schools overlap one another and it is wrong to contend that they are absolutely opposed to one another. As a matter of fact, they enrich our knowledge of jurisprudence and thereby help us to have a comprehensive view of the subject.

Salmond refers to three schools of jurisprudence, *viz.*, analytical, historical and ethical. "Analytical jurisprudence is the general or philosophical part of systematic legal exposition, historical jurisprudence is the general or philosophical part of legal history and ethical jurisprudence is the general or philosophical part of the science of the legislation. These three aspects of the law—dogmatic, historical and ethical—are so involved with each other that the isolated treatment of any of them is necessarily inadequate." Again, "The purpose of the first is to set forth the contents of an actual legal system as existing at any time, whether past or present. The purposes of the second is to set forth the historical process whereby any legal system came to be what it is or what it was. The purpose of the third is to set forth the law, not as it is or has been, but as it ought to be. It deals not with the past or present of any legal system, but with its ideal future and with the purpose for which it exists."

#### **(1) Analytical Jurisprudence**

The purpose of analytical jurisprudence is to study the first principles of law. Such a jurisprudence, according to Salmond, deals with such subjects as an analysis of the conception of civil law, an examination of the relations between the civil law and other forms of law, an analysis of the various constituent ideas of which the complex idea of law is made up, an account of the legal sources from which the law proceeds, together with an investigation of the theory of legislation, judicial precedents and customary laws, an enquiry into the scientific arrangement of the law, an analysis of the conception of the rights, an investigation of the theory of legal liability and an examination of any other legal conception which deserves special attention from the philosophical point of view.

The great exponents of the analytical school are Bentham, Austin, Markby, Amos, Holland and Salmond. According to



this school, law consists of "commands, set as general rules of conduct, by a sovereign to a member or members of the independent political society wherein the author of the law is supreme." Law is not found but made. The analytical school starts from the actual facts of law and then tries "to classify them, to explain their connotation, to show their relations to one another." According to Gray, "Most of us hold in our minds a lot of propositions and distinctions which are in fact identical or absurd or ideal and which we believe or pretend to ourselves to believe and which we impart to others as true and valuable. If our minds and speech can be cleared of those, there is no small gain." According to Austin, the object of his work on jurisprudence was one of "clearing heads and untying knots."

The analytical school differs from the historical school in the sense that it does not bother about the historical origin and development of legal institutions. It simply takes for granted the legal system as it is and analyses the same. It attempts a systematic exposition of the legal ideas pertinent to those "ampler and maturer systems of laws which are most pregnant with instructions."

According to Dr. Julius Stone, "Analytical jurisprudence as the study of logical relations within the law serves, therefore, a useful purpose. Its main tasks are to detect and define the terms actually employed; to state the axioms actually employed; to examine whether legal propositions ostensibly deduced from them do follow in logic; and to inquire what definitions and axioms might yield a maximum of self-consistency in the body of legal propositions." (P. 52, *The Province and Function of Law*).

### **Bentham (1748-1832)**

Paton rightly points out that full credit has not always been given to Bentham as the founder of the English analytical school. It appears that although Bentham was interested in writing, he did not take the trouble to publish all that he wrote. The result was that one of his manuscripts was published as late as 1945. This book known as "The Limits of Jurisprudence Defined", was written in 1782 but was deciphered and published by Professor Everett in 1945.

A study of his writings shows that the approach of Bentham to sovereignty was similar to that of Austin. His definition of law covered subordinate legislation and administrative regulation. His analysis of rights and duties was very much modern. He was a realist and was impatient of rhetoric. He condemned the pretensions of natural law. He tested every law by the criterion whether it led to the greatest happiness of the greatest number or not. He examined the structure, conception and



Bentham



functioning of the legal system in order to remove the existing abuses. He analysed legal terms such as pure, right, prohibition, obligation, property and liberty. He tried to show what in fact they meant in the world of practice. He would like to provide an introduction to a Civil Code.

It cannot be denied that Austin took from Bentham the tool of analysis. He adopted from him the theory of utility. The two sides of Bentham's work created two separate schools and those were the pure analyst interested in the law as such and the teleological writer interested in the ends which law should pursue. Paton rightly says that it was unfortunate that the work of Bentham was not taken in its entirety for a long time. Analysis alone is barren without a social policy. A study of the objective of law is useless unless founded on an analytical appreciation of the existing law.

### **John Austin (1790-1859)**

John Austin was born in 1790. At the age of 16 he joined the Army and served as a Lieutenant in Malta and Sicily up to 1812. He resigned his Commission in the Army and began studying law. In 1818, he was called to the Bar. For seven years, he practised as an equity draftsman in Lincoln's Inn but without success. In 1819, he married Sarah Taylor, who was a woman of great intelligence, energy and beauty, to whom Bentham in his old age was devoted and he collected around her many of the most distinguished men of her day in France, Germany and England. After their marriage, the Austins became neighbours in London of Bentham and the Mills.

In 1826, when the University of London was founded, Austin was appointed Professor of Jurisprudence and he spent the next two years in preparing his lectures mainly in Bonn where he read the newly discovered Institutes of Gaius, the Pandects and the works of Hugo, Thibaut and Savigny and made friends with Niebuhr and Schlegel. His opening lectures in 1828 were attended by John Stuart Mill, George Cornewall Lewis, Romilly, etc. However, after this initial success, Austin failed to attract new students and in 1832 he resigned the chair in bitter disappointment.

Through the efforts of his wife, an expanded version of the first part of the lectures was published in 1832 under the title of "The Province of Jurisprudence Determined." However, no notice of it was taken by any learned journal. In 1834, Austin repeated the lectures at the Inner Temple but there also he met with no success. Consequently, he gave up the teaching of jurisprudence altogether.

In 1833, he was appointed to the Criminal Law Commission, but he resigned after signing its first two reports. In 1836,

he was appointed Commissioner with George Cornewall Lewis to advise on the legal and constitutional reform of Malta. The recommendations of the Commissioners were adopted by the Colonial Office and Austin received £ 3,000. For the next ten years, Austin lived abroad in Germany and in Paris, supported by the earnings of his wife as a writer and a translator. In 1848, the Austins went back to England and lived there in retirement till Austin died in 1859.

It is to be observed that Austin wrote with extreme difficulty. He imposed on himself standards of precision and clarity that made work a torment. In the 27 years between the publication of "The Province of Jurisprudence Determined" in 1832 and his death in 1859, he published only a couple of articles and a pamphlet "A Plea for the Constitution." The second edition of "The Province of Jurisprudence Determined" was published by his widow Sarah Austin in 1861. She also reconstructed from the notes of her husband the main "Lectures on Jurisprudence or the Philosophy of Positive Law" and published them in 1863.

Austin is called the father of English Jurisprudence or the founder of the analytical school. However, it is pointed out that the title analytical school is misleading as it suggests that analysis is the exclusive property of this school instead of being the universal method of jurisprudence. Allen prefers to call the school of Austin as the imperative school. However, it is pointed out that Austin does not fit exactly into any of the important schools. In some ways, he was a precursor of the pure science of law, because he drew somewhat narrowly the boundaries of jurisprudence. Austin was not unmindful of the part played by ethics in the evolution of law. As a matter of fact, he devoted several lectures to the theory of utility. However, finding works of jurisprudence full of confusion, he decided to confine jurisprudence to a study of law as it is, leaving the study of the ideal forms of law to the science of legislation, or philosophic jurisprudence.

"The Province of Jurisprudence Determined" is the best known work of Austin. However, Austin himself described that work as a merely prefatory though necessary and inevitable part of the Lectures. When he published "The Province of Jurisprudence Determined" in 1832, he printed along with it an elaborate outline of the full course. Austin insisted that the science of general jurisprudence consisted in the clarification and arrangement of fundamental legal notions. To quote Austin, "I mean, then, by General Jurisprudence, the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law: understanding by systems of law, the ampler and maturer systems which by reason of their amplitude and maturity are pre-eminently pregnant with instruction." However, it is to be noted that Austin did not give any

criterion for amplitude and maturity. He also did not explain whether the common principles were those which were in fact found to be common or those which for some reason were treated as being necessary. There was also no demonstration that the notions which he put into his book were in truth shaped by ampler and maturer systems, whatever those might be. Moreover, if we look at the substance of his book, we find that it was drawn mainly from English Law with occasional superficial references to Roman Law. His jurisprudence was essentially particular and at the most comparative. Buckland rightly points out that although Austin professed general jurisprudence, he did not in fact adhere to it in practice.

The object of Austin in "The Province of Jurisprudence Determined" was to identify the distinguishing characteristics of positive law and to free them from the confusion with the precepts of religion and morality which had been encouraged by Natural Law theorists and exploited by the opponents of legal reform. In order to do that, Austin used two notions. The first notion was that of a command which he analysed as an expression of desire by a person who had the purpose and some power to inflict an evil in case the desire was disregarded. The second notion was that of a habit of obedience to a determinate person. In terms of these two notions, Austin defined "being under a duty or obligation", "sanction", "a superior", "independent political society", and "sovereign". According to him, "being under a duty or obligation" meant liable to an evil from the person commanding in the event of disobedience. The term "sanction" meant the evil which will probably be incurred in case a command was disobeyed. The term "superior" implied a person or persons who could compel others to obey. "Independent political society" implied a society of which the bulk were in a habit of obedience to a determinate human superior who was in no such habit of obedience to another. The term "sovereign" meant a determinate human superior not in the habit of obedience to a like superior but in receipt of habitual obedience from the bulk of human society. "Laws properly so called" were defined by Austin as commands which oblige a person or persons to a course of conduct. The essential difference of positive law was that it was set by a sovereign to the members of an independent political society.

According to Austin, positive law was one element in a three-fold division of rules for human conduct. The other two elements were positive morality and the laws of God. Positive morality was used by Austin as a comprehensive term for all man-made rules of human conduct which lacked the essential difference of positive law. It included such things as the rules of a game or a club, codes of manners or etiquette, international law and fundamental constitutional law. The laws of God

were properly so-called because those were commands and not positive law and also because those were not made by man. Some of those laws were revealed and the others were unrevealed. The laws of God revealed or thus discovered constituted the supreme test of the rules of positive law and positive morality, the standard determining not what they were but what they ought to be.

Austin gives the following definition of sovereignty: "If a determinate human superior not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent."

Austin points out that there are two marks of sovereignty and those are positive and negative. The positive mark is that the bulk of a given society is in the habit of obedience to a determinate common superior. The negative mark is that the determinate superior is not in the habit of obedience to some other superior. Moreover, the other attributes of sovereignty are continuity, indivisibility and illimitability. Regarding an independent political society, Austin observes thus: "In order that an independent society may form a society political, it must not fall short of a number which cannot be fixed with precision, but which may be called considerable, or not extremely minute."

It is to be observed that Austin confuses what may be called the *de facto* sovereign or the body that receives obedience with the *de jure* sovereign or the law-making body. In England, the Crown receives obedience from the British subjects but it is the Crown in Parliament which is the supreme law-making body. When Austin talks of another who makes law, he refers to the *de jure* sovereign. It is also pointed out that the negative mark of sovereignty is not the concern of municipal lawyers but of international lawyers. It makes no difference to the municipal lawyers that the law-making body is obedient to some other body in the international sphere, if in fact in municipal sphere it lays down their laws.

The view of Sir Henry Maine was that Austin's virtual identification of law with the product of legislation was appropriate only to contemporary western society and he had produced no argument for the restricted definition which entailed it. Lord Bryce found in Austin's definition of sovereignty a confusion between the notions of unlimited power and final authority which, even in the case of the United Kingdom to which his analysis was best suited, obscured the essential features. Kelsen and Salmond point out that although Austin was determined to use in his analysis only clear, hard, empirical terms, intelligible

to commonsense, yet he chose wrong fundamental notions for that laudable enterprise. The elements he used did not include the notion of a rule or the rule-dependent notion of what ought to be done. The notions of a command and a habit, however ingeniously combined, could not yield them or take their place though Austin often used the word "rule" and defined it as a kind of command. That accounted not merely for the dogmatic insistence that every law must derive its status as law from an express or a tacit prescription and for minor distortions such as the analysis of duty in terms of the chance or likelihood of incurring a threatened evil in the event of disobedience, but also for Austin's over-simplification of the character of political society. According to Prof. Hart, the most serious criticism that could be sustained against Austin was that he was unaware that in committing himself, as he did in his essay "On the Uses of the Study of Jurisprudence", to the view that jurisprudence was concerned with what was necessary and bottomed in the common nature of man, he had identified himself with what was most intelligible in the natural law theories which he despised.

About Austin's view of law and sovereignty, Buckland observed thus: "This, at first sight, looks like circular reasoning. Law is law since it is made by the sovereign. The sovereign is sovereign because he makes the law." As it is put, the statement is undoubtedly circular. Law is defined in terms of the sovereign and the sovereign is defined in terms of the law. However, Austin did not do so. He defined law in terms of the sovereign, but he defined the sovereign as the body that receives the habitual obedience of the bulk of a given society and that was obviously not circular. We also should not accuse Buckland of having misrepresented Austin, because what he said was that superficially Austin's argument looked circular. Buckland himself observed thus: "But, this is not circular reasoning; it is not reasoning at all. It is definition. Sovereign and law have much the same relation as centre and circumference."

It is pointed out that Austin did not deal properly with the problem of the basis of jurisprudence. He assumed without any real investigation, that certain principles, notions and distinctions were common to all systems of law. However, it is pointed out that there are no universal rules of law. There is hardly any rule of today which can be matched with another rule of yesterday. The moment we come to the conclusion that there is a certain universal rule of law, some investigator into the legal systems of the world discovers that that rule of law did not apply to a particular country. The result is that the rule of law loses its universality. Moreover, even if a few rules are proved to be universal, they form a somewhat narrow basis for a science of law. Much of what the Romans considered universal



is not considered so today on account of the changes and circumstances. What were considered to be universal principles in the 19th century are not considered in that way today. The rules of property which were considered to be axiomatic in 1850 have changed completely after the Russian Revolution of 1917. The solution of the problem suggested by Paton is that although there are a few rules of law that are universal, yet there may be universal principles of jurisprudence. Even if there are no common elements discoverable in the legal systems of the world, jurisprudence would still have the function of tracing the relation between the law and the life of the people. Jurisprudence is founded on the attempt, not to find universal principles of law but to construct a science which will explain the relationship between law and the life of society.

In 1901, Lord Bryce observed that the contributions of Austin to juristic science were so scanty and so much entangled in error that his book should no longer find a place among those prescribed for students. This is, however, going too far.

No impartial observer can deny the great contribution made by Austin to the study of jurisprudence. English jurisprudence has been and still is predominantly analytical in character and other influences are merely secondary. It is true that there is little original in Austin and he was inspired above all by Bentham from whom he inherited hatred of mysticism and unreality and a passion for classification, legislation and codification. It is also true that the main doctrines of Austin can be identified in his predecessors. His definitions of law, sovereign and political society can be found in those of Bentham and Hobbes. However, the achievement of Austin lay in the fact that he was able to segregate those doctrines from the political and philosophical discussions in which they were embedded. He also re-stated them with a new firmness, grasp of detail and precision. Both lawyers and political thinkers could not only understand them but also use them to dispel the haze which still blurred the distinctions between law, morality and religion and obstructed the rational criticism of legal institutions. Likewise, it was Austin who first demonstrated to English lawyers in their own idiom how the understanding even of unsystemised English Law, with its forest of details, could be increased and its exposition improved by the use of a theoretical structure and precise analysis.

Prof. Hart also points out that from Austin has descended a line of English analytical jurists. Amos, Markby, Hearne, Holland, and Salmond did not differ from Austin in their conception and arrangement of the subject even when they opposed his doctrines. Although the influence of Austin was less direct in the United States, yet the same could be seen in "Nature and Sources of Law" by Gray. There is a lot in common





Savigny

between the views of Austin and Kelsen. Undoubtedly, the students of jurisprudence are very much indebted to Austin.

## **(2) Historical Jurisprudence**

According to Salmond, "Historical jurisprudence is the history of the first principles and conceptions of the legal system." According to Lee, "Historical jurisprudence deals with law as it appears in its forms and at its several stages of development. It holds fast the thread which binds together the modern and the primitive conceptions of law and seeks to trace through all the tangled mazes which separate the two, the line of connection between them. It takes up custom as enforced by the community and stresses its development. It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development and to point out those conditions and influences which modify them in the varying course of their existence. But historical jurisprudence is not a mere branch of anthropology or sociology except in so far as any science which deals with human life may be regarded as a department of these studies. It does not attempt to set forth all laws and customs which may be found in ancient and modern savage tribes as well as in civilized nations of every clime. If such were its object, it would not be a science, nor would it be possible for it to be complete. It would be a mere collection of laws and customs, having no necessary order or system. Its attainment or lack of perfection would depend merely upon the degree of completeness with which its collection had been made."

The great exponents of historical jurisprudence were Savigny, Sir Henry Maine, Vinogradoff, Pollock, Maitland, Sir William Holdsworth, Puchta, Carter, Ihering, and Montesquieu.

Savigny was born in 1779. His interest in historical studies was kindled at the Universities of Marburg and Gottingen. This was all the more increased when he came into contact with Niebuhr at the University of Berlin. He also acquired a great respect for Roman Law. In 1803, he published his book called "The Law of Possession". He traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. His "The History of Roman Law in the Middle Ages" appeared in six volumes between 1815 and 1831. His other works were "The System of Modern Roman Law" and "On the Vocation".

According to Savigny, "In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people like their language, manner and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an

individual people, inseparably united in nature and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common convention of the people. The kindred consciousness of an inward necessity excluding all notions of an accidental and arbitrary origin....*Law grows with the growth, and strengthens with the strength of the people and finally dies away as a nation loses its nationality*....the sum therefore of this theory is that all law is originally formed in the manner in which in ordinary, but not quite correct, language customary law is said to have been formed, *i.e.*, that it is first developed by custom and popular faith, next by jurisprudence, everywhere therefore by internal silently operating powers, not by the arbitrary will of a law-giver”.

According to Savigny, the nature of any particular system of law was a reflection of the spirit of the people who evolved the law, the *Volksgeist*. Law is the manifestation of the common consciousness. A nation is a community of people linked together by historical, geographical and cultural ties. The broad principles of the system are to be found in the spirit of the people. Their first concrete manifestation is in early customary rules. The view of Savigny was that law was a matter of unconscious growth. Custom not only precedes legislation but is also superior to it. Legislation has always to conform itself to the popular consciousness. Law is not of universal application and it varies with the people and the times. If law consists of the projection of the spirit of a people, it can only be understood by tracing the history of the social organisation of the people.

The critics of the idea of *Volksgeist* point out that although there is an element of truth in it, yet Savigny exaggerated the same. His inferences were sweeping in the extreme. The whole idea of the *Volksgeist* suited the mood of the people of Germany at that time. German thinking was prone to personify the abstract and to attribute a mystical coherence to ideals. The idea of a *Volksgeist* may be accepted in a limited way but Savigny made it universal in a sweeping manner. The result was that his historical sense left him. In dealing with possession also, Savigny drew an inference from limited data and then used it as an *a priori* talisman. It is also pointed out that the transplanting of Roman Law nearly a thousand years later was inconsistent with Savigny's idea of a *Volksgeist*. It postulates some quality in the law rather than popular consciousness. The German Civil Code has been adopted in Turkey and Japan without doing any violence to popular feelings, and the same applies to the adoption of English Law in various parts of the world.

Critics also point out that the *Volksgeist* theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. Every man is a product of his time. Occasionally there are men, who by their supreme genius, are able

to give legal development a new direction. Many institutions have originated, not in a *Volksgeist*, but in the convenience of a ruling oligarchy, *e.g.*, slavery. Many customs owe their origin to the force of imitation rather than to any innate conviction of their righteousness. Local customs may not reflect the spirit of the whole population. Some customs were cosmopolitan in origin. They were not the creatures of any particular nation or race. Important rules of law sometimes develop as the result of conscious and violent struggle between conflicting interests within the nation and not as a result of imperceptible growth. This applies to law relating to trade unions and industry.

It is pointed out by the critics of Savigny that if his idea of the *Volksgeist* was taken literally, it would have stood in the way of the unification of Germany. It would have emphasized the separateness and unique character of each separate state. Critics also point out to an inconsistency in the views of Savigny. While Savigny was an advocate of the idea of the *Volksgeist*, he also worked for the acceptance of Roman Law as the law of Germany. This inconsistency was probably due to his devotion to Roman Law.

According to Savigny, the *Volksgeist* formulated only the rudimentary principles of the legal systems. As society became more and more complex, a special body of persons came into being to give technical and detailed expression to the *Volksgeist* in the various matters with which the law had to deal. Those persons were the lawyers, and their work was to reflect accurately the *Volksgeist*.

The view of Savigny was that legislation was subordinate to custom. It must at all times conform to the *Volksgeist*. However, this does not mean that Savigny was opposed to legislation altogether. To quote him, "The existing matter will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it a vivid creative energy—obtain the mastery over it by a thorough grounding in history and thus appropriate to ourselves the whole intellectual wealth of preceding generations."

Savigny was opposed to the codification of law. He pointed to the defects of contemporary codes which preserved subsidiary and often unsuitable rules of Roman Law, even though they rejected its main principles. Even at its best, codification could not be a suitable instrument for the development of German Law in his time. He was also doubtful about the possibility of a code at some future time. The view of Savigny was that codification must be preceded by "an organic, progressive, scientific, study of the law". It is true that reform must wait until historians have done their work, but this does not mean that the work of codification should wait indefinitely.

Criticising the views of Savigny, Paton points out that some customs are not based on an instinctive sense of right in the com-

munity as a whole but on the interests of a strong minority. This applies to the institution of slavery. Moreover, while some rules may develop unconsciously, others are the result of conscious effort. This applies to the law relating to trade unions. Paton points out that the creative work of the judge and jurist was treated rather too lightly by Savigny. The life of a people may supply the rough material, but the judge must hew the block and make precise the form of law. It is dangerous to regard the judge as a mere passive representative of the *Volksgeist*. Both in equity and in common law, we can still trace the influence of the masters of the past. Paton also points out that imitation plays a greater part than the historical school would admit. Much Roman Law was consciously borrowed. The countries of the East have borrowed from the codes of Germany and France.

Pound points out that Savigny encouraged "juristic pessimism", which means that legislation must accord with the instinctive sense of right or it was doomed to failure. Conscious law reform was to be discouraged.

There was sometimes a tendency to think that once the evolution of a rule had been traced, that justified its existence. It is easy to accept abuses to which one is accustomed. Nothing binds the vision so much as custom and habit. There was a time when the criminal law of England was in such a state that it would have been a disgrace to a half-civilised community, but in spite of that judges and high authorities and writers wrote about it that it was the perfection of human wisdom.

### **Sir Henry Maine (1822-1888)**

Sir Henry Maine was also an exponent of historical jurisprudence. He began his work with a mass of material already published by the German Historical School on the history and development of Roman Law. He was able to build on that and that helped him to present more balanced view of history than we find in Savigny. His knowledge of English, Roman and Hindu Laws helped him to apply the comparative method to the study of law. His most important work was "Ancient Law".

Sir Henry Maine compared the various legal systems and came to the conclusion that societies could be divided into two categories: static and progressive. The early development of both types was roughly the same and four stages could be noticed. The first stage was that of law-making by personal command, believed to be of divine inspiration. In the second stage, those commands crystallized into custom. In the third stage, the ruler was superseded by a minority which obtained control over the law. The fourth stage saw the revolt of the majority against the minority controlling law and thus the law was published in the form of a code.

The view of Maine was that static societies did not progress beyond that point. However, the progressive societies continued

to develop law by three methods of fiction, equity, and legislation. Many examples of the use of fiction are to be found in Roman Law and early English Law. For centuries, equity has occupied an important place in the field of law. Legislation today is the most dominant factor.

The view of Maine was that no human institution was permanent and change was not always for the better. He was in favour of legislation and codification. He did not accept the view of the Volksgeist of Savigny.

According to Maine, in all early societies, the legal condition of the individual were determined by status. His rights, duties, privileges, etc., were determined by law. The march of progressive societies witnessed the disintegration of status and determination of the legal condition of the individual by free negotiation. To quote Maine, "*The movement of progressive societies has hitherto been a movement from status to contract*".

It cannot be denied that there was much to support the view of Maine that progress of society was from status to contract. In Roman Law, there was the gradual amelioration of the condition of children, women and slaves, the freeing of unmarried women from tutelage and the acquisition of a limited contractual capacity by children and slaves. In England also the bonds of serfdom were relaxed and ultimately abolished. Employment was based on a contract between master and servant. In the time of Sir Henry Maine, legislation removed the disabilities of groups such as Catholics, Jews, and Dissenters. However, in modern times, we find a return to status. In public affairs, particularly in industry, the individual is no longer able to negotiate his own terms. It is the age of collective bargaining. This development cannot be held against Maine. The reason is that his view was that the development had "hitherto" been a movement towards contract. He did not refer to the future.

Law is found and not made. The growth of law is essentially an unconscious and organic process. Legislation is therefore of less importance than custom. As law develops from a few easily grasped legal relations in primitive communities to the greater complexity of law in modern civilization, popular consciousness can no longer manifest itself directly. It comes to be represented by lawyers who formulate the technical legal principles. The lawyer remains an organ of popular consciousness. His task is to bring into shape what he finds as raw material. Legislation comes at the last stage. The lawyer is a relatively more important law-making agency than the legislator. Laws are not of universal validity or application. Each people develops its own legal habits according to its peculiar language, manners and constitution. Neither language nor law is capable of application to other peoples and countries.



Saliciles gives his criticism of the historical school of jurisprudence in these words: "The historical school had opened the way; it remained as if glued to the spot, incapable of using the instrument of evolution and practice which it had just proclaimed. The reason was that it had in advance clipped its wings and disarmed itself by declaring that it could not scientifically exert an influence on the development of the phenomena of law; it could merely wait, register and observe. It refused to become a method either of creative legislation or interpretation. The historical school had abdicated....."

"To note after all is not to create.....History in its application to the social sciences must become a creative force. The historical school had stopped halfway".

According to Paton, the historical method in jurisprudence should be supplemented by a critical approach based on a philosophy of law in order that a true perspective may be obtained. Evolution is not necessarily progress and one of the best aids to our own shortsightedness in dealing with the familiar common law is an acquaintance with many systems. This is well recognised by those who pursue the historical method today.

### **Comparison**

It is interesting to compare the main characteristics of the analytical and historical schools of jurisprudence. According to the analytical school, law is a product of the State, but according to the historical school, law is found and not made. Law is self-existent.

According to the analytical school, if there is no sovereign, there can be no law. The view of the historical school is that law is antecedent to the State and exists even before a state organisation comes into being.

According to the analytical school, law is enforced by the sovereign. The view of the historical school is that law is independent of political authority and endorsement. It is enforced by the sovereign because it is already law. It does not become law because of its enforcement by the sovereign.

According to the analytical school, the typical law is a statute, but according to the historical school, the typical law is custom.

According to the analytical school, custom does not become law until its validity is established by a judicial decision or by an Act of the Legislature. Custom is only a persuasive or historical source of law. The view of historical school is that custom is the formal source of law. It is transcendent law, and other methods of legal evolution such as legislation and precedent derive their authority from custom. Custom derives its binding force from its own intrinsic vitality and not from judicial precedent or legislation purporting to follow or legalise it.

According to the analytical school, law rests upon the force of the politically organised society. The view of the historical school is that law rests on the social pressure behind the rules of conduct which it enjoins.

The view of the analytical school is that law is a command of the sovereign. The view of the historical school is that law is the rule whereby a border line is fixed on one side of which lies the area of free individual action.

The view of the analytical school is that while interpreting a statute, judges should confine themselves to a purely syllogistic method. However, the view of the historical school is that while interpreting a statute, judges should take into consideration the history of the legislation in question.

### **(3) Ethical Jurisprudence**

According to Salmond, ethical jurisprudence is concerned with the theory of justice in its relation to law. It is primarily concerned with the conception of justice, the relation between law and justice, the manner in which law fulfils its purpose of maintaining justice, the distinction between the sphere of justice as the subject-matter of law and those other branches of right with which the law is not concerned and which pertain to morality alone and the ethical significance and validity of the fundamental legal conceptions and principles.

### **(4) Sociological Jurisprudence**

Reference may be made to schools of jurisprudence other than those mentioned by Salmond. According to the sociological school, there is an intimate connection between sociology and jurisprudence. Ehrlich goes to the extent of saying that jurisprudence is merely a branch of sociology. Cairns puts too much emphasis on sociology and his contention is that jurisprudence in modern times is meaningless without sociology. Law must be changed according to the changing circumstances. According to Ehrlich, "To attempt to imprison the law of time or people within the section of a code is as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool, and too little water can be put in the pond."

According to Dr. Gurvitch, "The sociology of law shows itself indispensable not only to the practical work of the jurist applying law to concrete cases, but also to the jurisprudence or the systematic dogmatization of a peculiar system of law. In effect, this discipline studies the patterns and jural symbols, that is to say the jural meaning validity for the experience of a particular group in a particular epoch, and works for the establishment of a coherent system of such symbols. Jurisprudence is social engineering, in the words of Roscoe Pound

and the various trends within it are only different techniques of such engineering suited to the interpretation of particular needs of concrete systems of law and corresponding types of inclusive societies." Again, "The sociology of law is that part of the sociology as the human spirit which studies the full social reality of law beginning with its tangible and externally observable expressions, in the facts of collective behaviours.....and in the material basis. Sociology of law interprets these behaviours and material manifestations of law according to the internal meanings, while inspiring and penetrating them, are at the same time in part transformed by them."

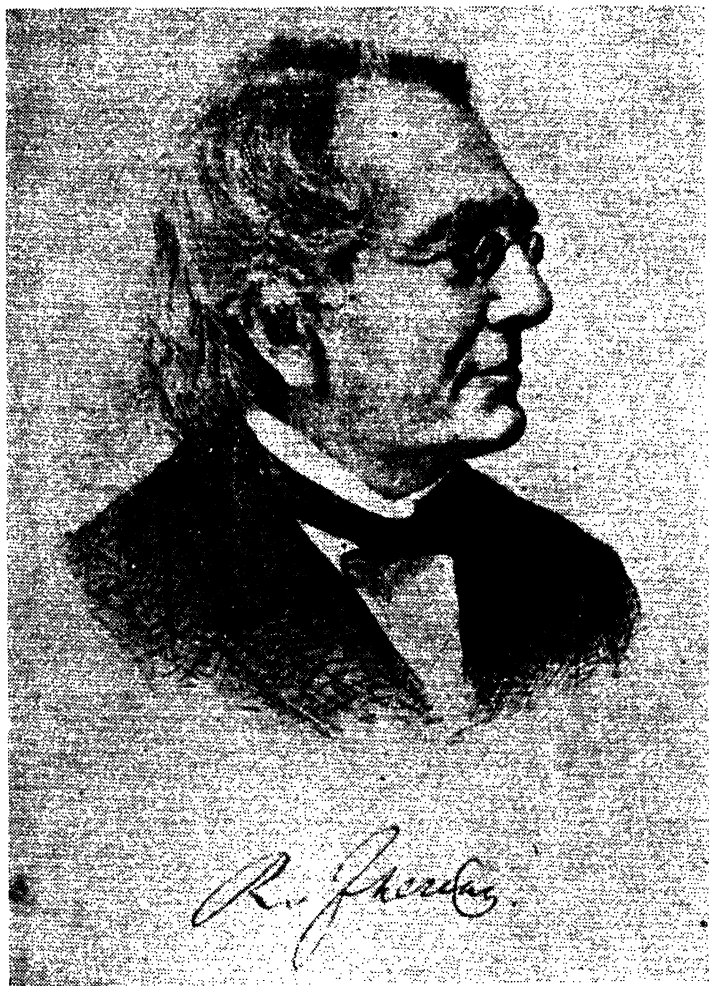
The great exponents of sociological jurisprudence were Montesquieu, Ihering, Duguit, Ehrlich, Holmes, Roscoe Pound, Cardozo and Cairns.

According to Montesquieu, the laws should be in relation to the climate of each country, to the quality of each soil, to its situations and extent, to the principal occupations of the natives, whether husbandmen, herdsmen or shepherds. They should have relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclination, riches, members, commerce, manners and customs.

Ihering (1818-1892) has been described as "Father of Modern Sociological Jurisprudence". Ihering started as an orthodox member of the German Historical School and intensively studied Roman Law. He published four volumes of a work called "The Spirit of Roman Law".

His major work was "Law as a Means to an End". Ihering felt that the dominant notion to be found in the exercise of human will was that of purpose. Causality in the natural world was governed by a "because". A stone falls because it must fall when it is without support. To quote him, "Human conduct is determined not by a 'because' but by a 'for', by a purpose to be effected; the 'for' is indispensable for the will as is the 'because' for the stone. The stone cannot move without a cause; no more can the will operate without a purpose".

Law is only a part of human conduct, and the dominant character of law is its purpose. The genius of the Roman lawyers lay not in their technical ingenuity in the construction and elaboration of legal concepts, but in their social *flaire* for the adaptation of those legal concepts to the changing needs of their society. Law is only an instrument for serving the needs of society. Its purpose is its essential mark. That purpose is to further and protect the interests of society. The social impulses and interests of man are not always in accord with his individual or selfish interests. The problem of society is to reconcile the selfish purposes with the social purposes. When the selfish purposes clash with social purposes, those have to be suppressed. The



Ihering



State must adopt measures to encourage the social purposes inherent in every individual. One of the chief methods is to identify his own selfish interest with some large social interest. This is done by the principles of reward and coercion.

Law is only one means of social control. It is only one factor in the network of social organisation. It is necessary to treat law in the context of social purposes and interests. Some of the conditions necessary for social life are realised without any intervention of law. Those can be called extra-legal conditions. Another sphere of the condition upon which social life is founded is that in which the law takes some part, although not a dominant part. There natural instincts, psychological trends and selfish interests provide the foundation, but legal regulation is imported to perfect the security of these interests. In modern times, legal regulation plays an all-important part in the fields of trade and working conditions. This can be called the field of mixed legal conditions. In addition, there is a sphere in the conditions of social life where the social interests are secured almost entirely by legal regulation. The raising of revenue for the State or the carrying out of military service fall in this category. These are purely legal conditions of social life. According to Ihering, "Law is sum of the conditions of social life in the widest sense of the term as secured by the power of the State through the means of external compulsion".

It is rightly pointed out that at least in America, the work of the leading modern exponents of sociological jurisprudence is an elaboration of Ihering's theory of interests. He was modern in the sense that he recognised the coercive character of law and so could meet the positivists on common ground. His approach to law is not a denial of the efficacy of analytical jurisprudence but a convincing demonstration of its inadequacy. Ihering did not claim that he was solving the problems of law and society. His task was merely to reconcile the conflicting interests although he does not tell us in which direction that was to be done. Although he draws our attention to the problems of society, he does not solve them.

### **Duguit (1859-1928)**

Duguit was a professor of Constitutional Law in the University of Bordeaux. One of his works has been translated into English by F. and H. Laski, and styled as "Law in the Modern State". He has criticised the classical idea of sovereignty, law as a command and the nature of the State. He has given a new approach to law, society and State.

According to Duguit, the outstanding fact of society was the interdependence of men. This interdependence was always there, but it has increased in modern time, on account of the increasing knowledge of man and his mastery over the physical

world. In modern society, we cannot live without the services provided to us by our fellowmen. Our food, our housing, our clothing, our recreation and entertainment are always dependent on the activities of other people. Specialisation has increased to such an extent that we can exist only by virtue of our membership of a community. Social interdependence is not a theory or a conjecture but a fact. It is an all-important fact of human life. All human activity and organisation should be directed to the end of ensuring the harmonious working of men with men. This is called by Duguit the *principle of social solidarity*.

As all human activity and organisation are to be judged from the manner in which they contribute to social solidarity, the State can claim no special position or privileges. The State is only one of the various human organisations which are necessary to protect the principle of social solidarity. The State can be justified in so far as it defends and furthers that principle of social solidarity. The State is nothing more than an organisation of men who issue commands backed up by force. If the State acts in a way which promotes social solidarity it is entitled to be upheld and encouraged. If it does not perform that function, the people have a right to revolt against it and suppress the State itself. The whole idea of sovereignty is meaningless. All power is limited by the test of social solidarity. Every man and every grouping of men is under duty arising out of the facts of social existence. That duty is to further social solidarity. To quote Duguit, "Man must so act that he does nothing which may injure the social solidarity upon which he depends; and, more positively, he must do all which naturally tends to promote social solidarity."

The attack of Duguit upon the State is a fundamental one. He does not recognise that the State is an indispensable form of human organisation. The State may be useful today, but it may not be useful tomorrow. The view of Duguit was that in the increasingly complex make-up of modern society, society must move towards decentralisation and groups syndacilism and away from the idea of a central machinery or authority. He felt that the State would wither away and men would manage their affairs without its help. While accepting State, Duguit put severe limitations upon the exercise of State power. His view was that the State must be prevented from doing anything which might harm the principle of social solidarity. The check may be put in the form of a written constitution or the power may be given to the judiciary for that purpose.

Duguit was opposed to all doctrines which assert the real personality of the State. Likewise, he denied any real personality to corporate groups. His view was that there was no distinction between public and private law. All law is only a means of serving the end of social solidarity. All law is of the same nature

and must be judged by the same criterion. The attempt to distinguish between private and public law is merely a pretext to elevate the State above the rest of society, and hence must be given up.

According to Duguit, there are no rights. The essence of law is duty. We are each of us called upon by the fact of our existence in society to play our part in furthering the solidarity of that society. The law is a means of facilitating our carrying out that function. The only right which any man can possess is the right always to do his duty. What we commonly call rights are only relationships with other people into which we are thrown by carrying out our social duties. The reality is not the right but the duty placed on the other person.

According to Gurvitch, the great merit of Duguit lies more in pointing out the existence of certain problems which had escaped Durkheim than in having solved them. Basically he continued and applied to his time the researches of the doctrinaires who pointed out the existence of a jural framework of society opposed to the State. Duguit's contribution to the sociology of law lies rather in his struggle against certain consecrated dogmas, and in his description of the recent transformation of law than in a methodical study of the problems. It is also pointed out that Duguit's work in jurisprudence has influenced and stimulated different movements of thought. His emphasis on the importance of the group influenced Jurists like Hauriou and Renard, who evolved the theory of law known as the Institutional Theory. Another strain in Duguit's philosophy led to Fascism. That was his minimising of the element of conflict in the society and his insistence on the identity of interests of all groups within society. The National Socialist jurists built upon this foundation. It is also to be noted that the Russian Soviet jurisprudence has been greatly influenced by the work of Duguit. His functional approach to society and law, his denial of distinction between public and private law, and his idea of the withering of the State have all influenced the Russian jurists.

According to Paton, the main criticism of Duguit is that in founding law simply on the facts, he failed to understand the true nature of ethical forces. Dr. Allen, after recognising the services of Duguit to jurisprudence by emphasising that law is essentially the product of social forces, says: "But he goes far beyond any sociological theory of law which has yet been advanced when he attempts to evaporate all ethical content out of law. To banish the notion of right wholly from law, as M. Duguit seeks to do, is to make it meaningless and to revolt an instinct which is deep-seated in human nature." Paton points out that solidarity may be filled with any content we desire. It is not an end in itself but a mere means to the



purposes which the man wishes to achieve. Men may join together to collect the scalps of their neighbours or to preserve the peace of the world. A community of masters and slaves may have greater cohesion than a democracy. While law is based on facts, it is created only when men use their wills to choose between one set of facts and another. Rules are created because men say that "this is better than that", and because they agree to place their wills at the service of the chosen end. No theory is satisfactory which divorces law from the wills of men. Paton also points out that with the passage of time, Duguit put more and more emphasis on the sentiment of justice. In the end, he became entangled with that metaphysic which he had sworn to eschew. Although he denied that there were absolute ideals of justice, he really postulated as the basis of his theory the greatest possible co-operation of men for the highest possible ends. So interpreted his doctrine becomes an unconscious natural law theory that law is based on the reasonable needs of the community life. However, this would not have been approved of by Duguit.

### **Ehrlich (1862-1922)**

Ehrlich was an Austrian Jurist. His philosophy is to be found in a work translated as "Fundamental Principles of the Sociology of Law".

According to Ehrlich, the real law of the community was not to be found in the traditional formal legal sources, in statute and decided cases. The norms which governed life in a society are imperfectly and partially reflected in the formal law of that society. A commercial usage becomes established as it is convenient and efficient. With the passage of time, it is recognised by the courts and incorporated into contracts. Ultimately it is given a statutory form as in the Sale of Goods Act, 1893. However, fresh commercial usages grow up and those also are ultimately incorporated in the law of the country. The net result is that the formal law can never catch up with the living law. There is always a gap between what the law says about a given topic and the way in which people actually behave in the context of that topic. In certain cases, law contradicts the practice on that topic. Sir Carleton Allen tells us that "the London Stock Exchange, despite the express provisions of Leeman's Act, persistently refuses to specify the serial numbers of the shares in a contract for the sale of banking shares; underwriters constantly disregard Section 4 of the Marine Insurance Act, 1906, which provides that every insurer of a cargo or bottom must have an insurable interest in the same". Likewise, it is provided in the Moneylenders' Act, 1900, that if the interest is excessive and the transaction is harsh and unconscionable, the borrower may obtain relief. "When it is found that the interest charged exceeds the rate of 48 per cent per annum, there is a presumption that the interest charged is excessive and that the transaction is harsh and unconscionable". In spite of this provi-

sion, there are moneylenders who charge interest at the rate of 48% per annum and although thousands of transactions take place on that basis, no cases are brought before the courts by the borrowers. Obviously, the practice differs from the law. Likewise, a large number of technical assaults and batteries are committed but those are not brought to the notice of the courts. In actual practice, the police also do not prosecute all those who are guilty of various offences particularly when it is considered inexpedient to do so. The conclusion of Ehrlich is that if we want to know the living law of a society, we cannot confine ourselves to the formal legal materials but we have to go beyond that in order to find out how people actually live in society. To quote Ehrlich, "The centre of gravity of legal development lies not in legislation nor in juristic science, nor in judicial decision, but in society itself".

According to Ehrlich, the State is not the only source of law. The machinery of the State is only one factor in social control. If we want to have a full picture of social control, we must also consider the customs, morality, the practice of groups and associations. Ehrlich does not find any difference between law and custom. It appears to him that both of them have the same sanction which is in the form of social pressure. Whether the norm is a statute or the practice of a group, the reason for its observance is exactly the same and that is the communal urge which arises from the facts of social life. To quote Ehrlich, "The individual is never actually an isolated individual; he is enrolled, placed, embedded, wedged into so many associations that existence outside of these would be unendurable". The view of Ehrlich was that a law which was not habitually observed was not a part of the living law of the community. His calculation was that about one-third of the sections of the Austrian Civil Code had no influence whatsoever upon the life of the people.

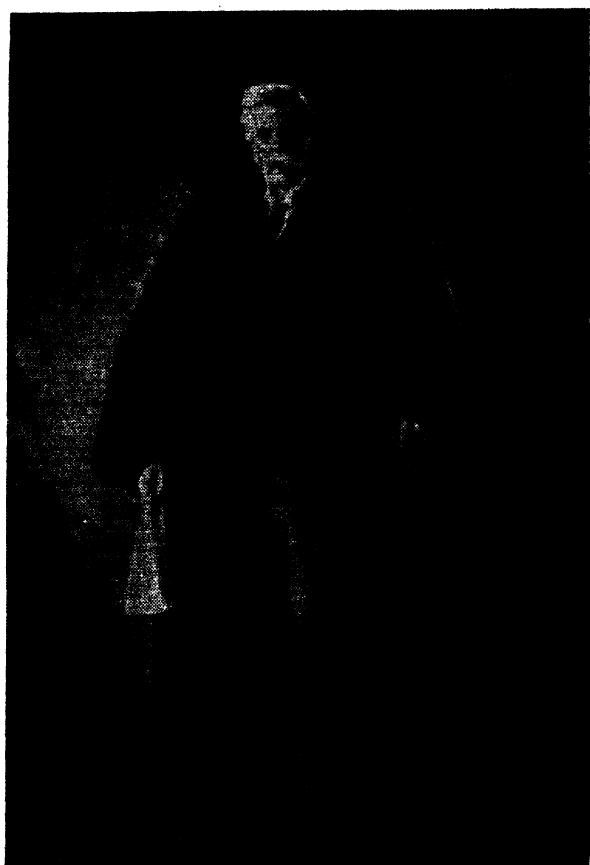
The view of Ehrlich was that the traditional scope of jurisprudence was hopelessly narrow and the same must be enlarged if the subject was to have contact with reality. The Jurist should study not only the formal legal system but also the rest of the living law. He must see to it that the formal law kept pace with the way in which people actually lived. To quote Ehrlich, "The law does not consist of legal propositions but of legal institutions. In order to be able to state the sources of the law, one must be able to tell how the State, the church, the commune, the family, the contract, the inheritance came into being, how they change and develop." If we want to know the real law regulating the factories, we must study not only the Factories Acts but we must also go to the factories and examine how far the formal law is being observed and how far the same is being ignored and what other rules in actual practice govern the relations of the employer and the employees. If one were to follow the process suggested by Ehrlich, a life-time would be required to deal with one Act.

No wonder, Allen is tempted, without 'disrespect to the labours of a very learned, sincere and original Jurist', to term this kind of project as "Megalomaniac jurisprudence." Some limit has to be drawn because otherwise jurisprudence will dissipate its energy over too wide an area.

It cannot be denied that Ehrlich advised the Jurists to come out of their ivory tower of analytical jurisprudence and walk on fields of actual life where law must work and be tested. His work was undoubtedly stimulating and beneficial. However, it is pointed out that Ehrlich did not attach sufficient weight to the way in which formal law itself influences and reforms the practices of society. Ehrlich followed the fatalistic attitude of Savigny. The view of Ehrlich that formal law merely confirms the real norms of social law tends to give to conscious law making only a rubber stamp efficacy and deprives it of its creative power. It is true that the reforming legislation is very often the formal expression of a public feeling. However, there are cases where legislation imposes a novel idea upon public opinion and it is only in course of time that public opinion accepts it and approves of it. This aspect of the matter was not given due recognition by Ehrlich.

Critics also point out that the picture of society given by Ehrlich was more true of a primitive society than is the case today. In modern society, the state association plays an important part in the social field through the machinery of law. It is also pointed out that Ehrlich did not make any sharp distinction between the legal norm and other social norms. It is true that too much emphasis is put on that distinction in analytical jurisprudence but for the purposes of study of law, the distinction cannot be ignored. Without that, the subject of jurisprudence is likely to become completely unwieldy. It is true that law must be studied in the social context but that does not mean that we should allow ourselves to be completely lost while studying too many details of the various aspects of social life and their impact on law. If we do so, we will be creating a confusion of the worst type and the study of jurisprudence will become a hopeless task.

According to Dr. Gurvitch, the essential defect in the philosophy of Ehrlich is the total lack of micro-sociological and differential analysis, that is to say, any accounting for the forms of sociality and jural types of groupings. Ehrlich's sociological and jural pluralism is an exclusively vertical one. It leads him to confuse under the terms "Law of Society", a series of different kinds of law and this confusion is repeated with respect to rules of decision and abstract propositions. According to him, whatever is institutional or spontaneous in law comes from society opposed to State and has the character of internal law of associations. Contractual law, law of property, and law of



**Holmes**



unilateral domination are only masked forms of law of society and the objective and spontaneous order of individual law does not exist. At the same time, the State is seen only under the form of abstract legal propositions as though there were not levels of depth within the order of the State and as though there did not exist a spontaneous political union distinct from other spontaneous unions. The absence of micro-sociology and jural typology of groupings leads in Ehrlich to sharply monistic conceptions. Moreover, the law of society is artificially impoverished by being confined solely to the sphere of the spontaneous, as though it did not have its own abstract propositions in autonomous statutes of groups, and its own rules of decision elaborated in the functioning of boards of arbitration and similar bodies.

### Justice Holmes

Professor Aronson points out that by publishing his "Common Law" in 1881 and "The Path of the Law" in 1897, Mr. Justice Holmes gave the signal for the sociological revolt in jurisprudence in the United States. In those books, Mr. Justice Holmes rejected the logical-analytical and historical schools. He insisted on the necessity for jurists to lean in their work on the disinterested and empirical study of living and actual social reality, such as is made by the social sciences and particularly by sociology. "If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics." "It is perfectly proper to regard and study the law simply as a great anthropological document. The study pursued for such ends becomes science in the strictest sense". This science is not limited to the study of external conduct. "It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression (which is law) of what have been the changes in dominant ideals from century to century". Thus, the scientific study of the morphology and transformation of human ideas in the law enters in the field of positive sociological study of the latter. It could not be otherwise if "the first requirement of a sound body of law is that it should correspond with the actual feeling and demand of the community", and if "the very considerations which judges more rarely mention are the secret rule from which law draws all the juice of the life. I mean, considerations of what is expedient for the community concerned." "We live by symbols and what shall be symbolised by any image of the right depends upon the mind of him who sees it." "A law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action."

According to Mr. Justice Holmes, "The actual life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions and public life, avowed or unconscious, even the prejudices which

judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which law shall be governed."

According to Mr. Justice Holmes, if you wish to know what law is, you must regard it from the point of view of a bad man who is only concerned with what will happen to him if he does certain things. The traditional description of law is that it is deduced from principles of one sort or another. "But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law."

According to Dr. Gurvitch, the ideas of Mr. Justice Holmes have inspired not only the representatives of sociological jurisprudence such as Pound, Cardozo, Brandeis and Frankfurter, etc., but also the partisans of legal realism, who hold to the exclusive description of official behaviour, of that which judges do and decide in each concrete case. Three elements in the thought of Holmes pushed him in a direction contrary to his major inspiration. In the first place, his definition not only of jurisprudence but of law itself as a "prophecy of what the courts will do" limited his vast programme of legal sociology by concentrating his attention on the description of a single level of depth of the social reality of law, that related to the activity of courts. Secondly, his insistence on the entire independence of law from any moral credo, due both to this purely technical conception and his exclusively individualistic interpretation of morals, permitted misrepresentations of Holmes's position, against which he protested in vain. In the third place, the identification of law and jurisprudence, the latter being regarded only as a generalisation of the former, entailed a lack of clarity as to the relations of jurisprudence and legal sociology which he was inclined to identify with each other. Desiring to make of jurisprudence, which is an art, a descriptive science in the narrow sense of the term, Holmes rather transformed involuntarily the authentic science of legal sociology into an art, while eliminating the aims of the effective art of jurisprudence. These difficulties were, however, much mitigated by the flexibility of Holmes's thought and particularly by his conception that tribunals themselves deal with the spontaneous law of society, which imposes itself on them.

### **Roscoe Pound**

Dr. Gurvitch rightly points out that the sociology of law in the United States has had its most elaborate and detailed, its most broadly conceived and subtle expression in the rich scientific productions of Dean Pound, the unchallenged chief of the school of sociological jurisprudence. His thought was formed by a

constant confrontation of sociological problems, philosophical problems, problems of legal history, and problems of the work of American courts. This multiplicity of centres of interest and of points of departure aided Pound to broaden and clarify ever more the vast perspectives of legal sociology and to develop gradually its different aspects.

In his earlier programmes for this discipline, Pound gave preference to the following practical aims :—

- (1) To make study of the actual social effects of the legal institutions and legal doctrines, and consequently to look more to the working of the law than to its abstract content.
- (2) To promote sociological study in connection with legal study in preparation of legislation, and consequently to regard law as a social institution which may be improved by intelligent effort discovering the best means of furthering and directing such effort.
- (3) To make study of the means of making rules effective and to lay stress upon social purposes which law subserves rather than upon sanction.
- (4) The study of sociological legal history, *i.e.*, of what social effect the doctrines of law have produced in the past and how they have produced them.
- (5) To stand for what has been called equitable application of law and to urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible moulds.
- (6) The end towards which the foregoing points are but some of the means, is to make effort more effective in achieving the purposes of law.

Pound has provided a sociological analysis of English and American types of Common Law. He has brought out the variations in the concept of law itself, as a function of types of society and corresponding legal systems. He has described the variation of theories on the relation between law and morals as a function of the social types. He has posed the problem of the sociological foundations of the knowledge of law. He has undertaken a study of the actual transformations of law. He has advanced the genetic sociology of law as applied to the type of contemporary society. His conclusions are that "Our common law policy presupposes an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavour to administer justice to great urban communities at the end of the nineteenth and in the twentieth centuries." "Demand for socialisation of law in the United States has come almost wholly, if not entirely, from the city." But "through all



vicissitudes the supremacy of law, the insistence upon law as reason (and not arbitrary will) to be developed by judicial experience in the decision of cases and the refusal to take the burden of upholding right from the concrete each and put it wholly upon the abstract all...have survived. These ideals are realities in comparison whereof rules and dogmas are ephemeral appearances." The various definitions of law and philosophies of law "were in the first instance an attempt at a rational explanation of the law of the time and the place or of some striking elements therein. These theories necessarily reflect the institution which they were devised to rationalise even though stated universally." Today "judicial empiricism and legal reason will bring about a workable system along new lines", but generally we can observe that law and law definitions and theories are "a continually wider recognising and satisfying of human wants and claims or desires through (jural) social control with the less sacrifice (of them)." The concrete relations of law and morals depend on the types of society and corresponding jural and moral beliefs.

According to Pound, the different interpretations of legal history are themselves conditioned by concrete situations of a type of society. The transformations of our actual legal system are the following :—

- (1) Limitations of the use of property.
- (2) Limitations upon freedom of contracts.
- (3) Limitations on the power of disposing of property.
- (4) Limitations upon the power of the creditor or injured party to secure satisfaction.
- (5) Transformation of the idea of liability in the sense of a more objective base.
- (6) Judicial decisions in regard to social interests, by limiting general rules to profit of flexible standards and discretion.
- (7) Public funds should respond for injuries to individuals by public agencies.
- (8) Reinforced protection of dependent members of the household.

Pound has distinguished between the administration of justice or the judicial process, law, legal order and jural values or the ideal element of law. His view is that in law itself, the level of rules or rigid law is other than the level of principles, conceptions and standards, or the discretionary law based upon intuition. He has shown the fact that the reality of law is not reducible to abstract patterns and that to study it in full it is necessary to go beyond symbols and into that which symbolises.

The view of Pound is that social reality and especially the social reality of law is penetrated by "ideal elements" or "spiritual values." Sociology of law is impossible for him except as part of what we have proposed to denominate the sociology of human spirit. As according to Pound there are combined in the social reality of law "social utility" and "ideal elements", "social needs, interests and adjustments" and "spiritual values", Pound arrives at an ideal-realistic conception of law. A synthesis of idealism and pragmatism guides Pound towards visualising jural values in their concrete particularisations and their functional relations with historical social structures and situations.

It appears that Pound does not arrive at an entirely accurate definition of the aims and methods of the sociology of law. In all his works, Pound has been faithful to his initial identification of the sociology of law with jurisprudence, the jural art or technique. Even that jurisprudence which is oriented on sociology (sociological jurisprudence) remains an art, bound to a particular situation, a particular system of law. Pound takes account of this fact as well as of the teleological nature of all jurisprudence, the sociological jurisprudence even more than all other types of jurisprudence. However, instead of clearly setting apart the sociology of law which, as a science based on reality judgments, must be independent of all estimation and goals of jurisprudence, he attributes practical ends to the sociology of law itself and thus makes it also teleological. He even conceives of profiting from his valuable demonstrations concerning the ideal-realistic structure of the jural fact, to conclude that one cannot deal with law, even sociologically, except in a teleological fashion. Pound does not notice that one can deal with the values which realise themselves in social facts and still abstain from pronouncing judgments of value and appreciation. He does not see the difference between the object and the method of handling it. He also does not distinguish between philosophical reflection and sociological description. A certain confusion of value judgments and reality judgments creeps into his sociology of law.

According to Pound, the task of law is "social engineering" by which he means the balancing of competing interests in society. To quote Pound, "For the purposes of the science of law, we may say that an interest is a claim, a want, a demand, of a human being or a group of human beings which the human being or group of human beings seeks to satisfy and of which social engineering in a civilised society must therefore take account. So defined, the interests which the legal order secures may be claims or wants or demands of individual human beings immediately as such (individual interests), of the political organisation of a society as such, conceived as a person (public interests) or of the whole social group as such (social interests)."

Pound has given a classification of social interests of which the law has to take account. The first is the social interest in the general security, which embraces those branches of law which deal with the maintenance of law and order, public health, and the security of acquisitions and transactions. The second is the social interest in the security of social institutions such as domestic institutions, religious institutions or political institutions. The law of divorce is an example of the conflict between the social interest in the security of the institution of marriage and the individual interests of the unhappy couples. The law has, in certain cases, put certain special disabilities on the children of adulterous unions in order to preserve the institution of marriage. The same applies to the conflict between the individual interest in freedom of speech and the social interest in preserving the control of the established churches. The third is the social interest in the general morals under which laws dealing with prostitution, drunkenness, gambling, etc., are included. The fourth is the social interest in the conservation of social resources, "the claim or want or demand of society that the goods of existence shall not be wasted, that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter be made to go as far as possible, and to that end that acts or courses of conduct which tend needlessly to impair these goods shall be restrained." This social interest conflicts with the individual interest in disposing of his property in any way he likes. The fifth social interest recognised by Pound is the social interest in general progress. This is described by him as "the demand that the development of human powers and of human control over nature for the satisfaction of human wants go forward; the demand that social engineering be increasingly and continually improved; as it were, the self-assertion of the group towards higher and more complete development of human powers." Pound saw four trends in the American legal scene which worked for the protection of this interest. Those were the policy of freeing property from restrictions upon its disposition or use, the policy of free trade and the prejudice against monopolies, the policy of freedom in industry, and the encouraging of invention by granting patent rights. The sixth social interest is "the claim or want or demand of society that each individual be able to live a human life according to the standards of the society." To quote Pound, "Such in outline are the social interests which are recognised or are coming to be recognised by modern law. Looked at functionally, the law is an attempt to reconcile, to harmonise, to compromise these overlapping and conflicting interests, either through securing them directly or immediately, or through securing certain individual interests or delimitations or compromises of individual interests, so as to give effect to the greatest number of interests or to the interests that weigh most in our civilisation, with the least sacrifice of other interests....I

venture to think of problems of eliminating fiction and precluding waste in human enjoyment of the goods of existence, and of the legal order as a system of social engineering whereby those ends are achieved."

In 1919, Pound put forward the following postulates as underlying contemporary society. In civilised society, men must be able to assume that others will commit no intentional aggressions upon them. In civilised society, men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order. In civilised society, men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith. They will make good reasonable expectations which their promises or other conduct reasonably create. They will carry out their undertakings according to the expectations which the moral sentiment of the community attaches to them. They will restore specifically or by equivalent what comes to them by mistake or unanticipated, or not fully intended situations whereby they receive at another's expense what they could not reasonably have expected to receive in the circumstances. In civilised society, men must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury on others. In civil society, men must be able to assume that others who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds.

However, Pound has himself conceded that new postulates, in addition to those mentioned above, are emerging. Those are the right of the employees to security of employment, the imposition of a burden on enterprises in industrial society to make compensation for the necessary human wear and tear and the postulate that the risk of misfortune to individuals is to be borne by society as a whole.

### **Justice Cardozo**

The views of Justice Cardozo on law are to be found in "The Nature of the Judicial Process" (1921), "Growth of the Law" (1927) and "Paradoxes of Legal Science" (1928).

Justice Cardozo's sociology of law sets out from reflections on the need for renovating actual juridical technique by closing the gap between it and the living reality of contemporary law. To begin with, his attention was concentrated on the activity of the courts. His first work entitled "The Nature of the Judicial Process" aimed at showing that "The growing uncertainty of the judicial decision" was an inevitable manifestation of the fact that the judicial process was "not discovery but creation", a creation

intensified by the actual situation of the life of law. That situation consisted in the fact that "for every tendency one seems to see a counter-tendency, for every rule its antinomy. Those antinomies were imposed on courts not only by fissures and gaps in legal rules, not only by the fact "that there are few rules, there are chiefly postulates, standards and degrees", but also by the spontaneous conflict of regulations in society itself. To quote him, "Back of precedents are the basic juridical conceptions, which are the postulates of juridical reasoning and further back are the habits of life, the institutions of society in which these conceptions had their origin and which by a process of inter-action they have modified in turn".

The view of Cardozo was that the sociology of law alone could explain the difficulties actually facing the judges. The freedom of the judges to make creative decisions was strictly limited by rules and codes, "the accepted standards of the right conduct" which found expression in the mores of society and of particular groups. "Life may be lived, conduct may be ordered, it is lived and ordered for unnumbered human beings without bringing them within the field where the law can be misread". It was not the judges but life itself which filled up open spaces in the law. If the judges have misrepresented the mores of their day or if the mores of their day are no longer choice of today, they could only submit to new spontaneous regulations springing out of society itself. Cardozo declared that he did not agree with those Jurists who seemed to hold that in reality there was no law except the decision of the courts. His view was that "Law and obedience to law are facts confirmed every day to us all in our experience of life. . . . We must seek a conception of law which realism can accept as true".

In his second book entitled "The Growth of the Law", Cardozo observed that the inquiry about the mores was a branch of social science calling for a survey of social facts rather than a branch of philosophy and jurisprudence themselves. However, "The two subjects converge and one will seldom be fruitful unless supplemented by the other. The method of sociology involves with growing frequency the approach from other angles." The different judicial techniques themselves were by the ages and the situations in the society. Justice might mean different things to different minds at different times. "We can learn whether a rule functions well or ill by comparison with a standard of justice or equity, known or capable of being known to us all through an appeal to every day experience." Even more "often the question before the courts is concerned with the rules that are to regulate some business enterprises or transactions. The facts of economic or business life are the relevant considerations". "The principles and rules of law have their roots in the customary forms and methods of business and fellowship, the prevalent convictions of equity and justice, the complex of belief and practice which we style the mores of the day."





Cairns

In his book entitled "Paradoxes of Legal Science," Cardozo says that the sociology of law must be guided by the consciousness that "law defines a relation not always between fixed points but often, indeed oftenest, between points of varying position". That is partly due to the fact the reconciliation of the irreconcilable, the merger of antitheses are great problems of law. Manners and customs are at least a source of law. The pressure of the mores may fix direction of the law. The relations between strict law and mores must be freed from the tyranny of concepts. They are tyrants rather than servants, when treated as real existences and developed with merciless disregard of consequences to the limit of their logic. Tyranny breeds rebellion and rebellion breeds emancipation.

According to Dr. Gurvitch, "Having set out from a much narrower basis than Pound and having left without consideration the problems of the jural typology of inclusive societies and of genetic legal sociology, Cardozo brought out with incomparable penetration the complexity of the social reality of law, of which he saw with singular clarity the plurality of levels of depth and their mutual conflicts. Thus he contributed largely to systematic sociology of law, all the more because of the flexibility of his philosophical mind which enabled him to emphasise the character of our discipline as a branch of the sociology of human spirit. Teleological—practical orientation, however, persisted in Cardozo's sociology, and prevented his conceptualistic relativism from bearing all its fruits."

### Cairns

The views of Huntington Cairns on law are to be found in "The Theory of Legal Science" and "Law and the Social Sciences". Cairns puts a lot of emphasis on sociology. His view is that modern jurisprudence is a meaningless and fruitless pursuit of a goal incapable of achievement. Jurisprudence is really an applied science and no technology has ever succeeded unless it is based on the findings of a pure science. No universal proposition could be laid down regarding legal concepts or rules as they differed from race to race. If jurisprudence was to be scientific, it must create a science of society and the basis must be human behaviour as influenced by and in relation to disorder. It was impossible to discover how law operated unless we had greater knowledge of the factors that were responsible for changes in society and also governed its evolution. When that was done, jurisprudence could apply those rules to reach useful results. The present position was that the Jurists were trying to build their house before laying down the foundations.

Critics of the sociological school point out that the advocates of sociological jurisprudence desire to teach a little of everything except law. A textbook on sociology cannot become a work on jurisprudence by merely changing the title. A knowledge of the



properties of clay may be useful to a modeller but 20 years spent in scientific analysis of that material would be a waste of the talent of the artist. Manning compares a sociological jurist to a professor of mathematics who is concerned about the bridges of the country and who urges his students to form the advance guard of creative engineering and who stresses that mathematics cannot be studied in isolation from town-planning. Another writer says : "Anatomy is all you need to know. It is true that you will gain your knowledge from a dissection of the dead and in your practice you will be concerned with the bodies of those who, at least until they receive your merciful attentions, are still in the land of the living. It is true also that in the case of the patient psychological forces, business worries and married life may affect his health. But the study of these things is difficult and if we want an impartial science we must leave them alone. Austin our founder recognized that some of these things would affect your professional practice, but he wisely concentrated on anatomy alone. I advise you to do the same and to save your profession from having a little knowledge of everything save anatomy".

The relationship between law and social interests can be studied by jurisprudence for three reasons. The first reason is that it enables us to understand the evolution of law in a better manner. What is required is not a dogmatic assumption that economic self-interest or some such force has determined the evolution of law but an analysis of the interaction between a tradition which has sanctified the structure of law and the immediate pressure of social demands. The second reason is that although the views of man on ethics and his social needs have changed yet the element of human interest provides a greater substratum of identity than the logical structure of the law. Comparative law shows that while the legal theories of two systems may be very much different, each may be forced for reasons of convenience to modify itself in application so that ultimately the practical results are not far removed. The third reason is that a study of the social interest is essential to the lawyer to enable him to understand the legal system.

According to Paton, "The greatest achievement of the functional school is that it has infused new life into both the body and the development of law. A promising beginning has been made which leads us to expect much in the future. The actual functioning of certain parts of the law has been intensively studied. Perhaps the most valuable results are a new understanding of the judicial method and a broader outlook both in the universities and in the courts. A determined attempt is now made to teach law as a function of society instead of as a mere abstract set of rules, while the courts are canvassing freely the reasons of social policy which lie behind certain rules of law". According to Dias and Hughes, the greatest practical contribution of the sociological school has been the field work it has inspired in examining the interaction of law with its social milieu.

According to *Ehrlich*, "At the present as well as at any other time, the centre of gravity of legal development lies not in legislation nor in juristic science nor in judicial decision but in society itself. This sentence perhaps contains the substance of every attempt to state the fundamental principles of the society of law."

According to *Allen*, "The whole theory of the sociological school is a protest against the orthodox conception of law as an emanation from a single authority in the State or as a complete body of explicit and comprehensive propositions applicable by accurate interpretation to all claims, relationships and conflicts of interest."

### **(5) Comparative Jurisprudence :**

Comparative jurisprudence employs the comparative method in the study of law and legal institutions. The students of comparative jurisprudence are not contented with the study of the legal system of any particular country. They arrive at their conclusions by a comparative study of the various legal systems. It is felt that if we have data from various systems, there are lesser dangers of generalisations. According to Holland, "Comparative law collects and tabulates the legal institutions of various countries and from the results thus prepared, the abstract science of jurisprudence is enabled to set forth an orderly view of the ideas and methods which have been variously realised in actual systems." The comparative method "collects, examines, collates the notions, doctrines, rules and institutions which are found in every developed legal system or at least in most systems."

### **(6) The Viennese School of Jurisprudence :**

#### **Hans Kelsen**

Hans Kelsen is the exponent of the Viennese school of jurisprudence. He stands for a pure law theory of jurisprudence. He would like to separate jurisprudence from all other social sciences, and liberate the "law from the metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of *jus naturale*". His views on law are to be found in his book entitled "General Theory of Law and State".

According to Kelsen, a theory of law must deal with law as it is and not with law as it ought to be. In this respect, Kelsen is at one with Austin. However, the view of Kelsen is that a theory of law must be distinguished from the law itself. Law itself consists of a mass of heterogeneous rules and the function of a theory of law is to relate them in a logical pattern and to organise the whole field into a single, ordered unity. Kelsen did not evolve his theory of law in a flash of inspiration. He came to his conclusion after a thorough study of the facts of the law as they were actually to be found. Another view of Kelsen is that a theory of

law should be uniform. It should be applicable at all times and in all places. He is thus an advocate of general jurisprudence. While Austin generalised from English and Roman Laws, Kelsen had more material to draw his conclusions from. The result was that his conclusions apply to a wider field.

Kelsen put emphasis on the fact that a theory of law must remain free from ethics, politics, sociology, history, etc. A theory of law must be pure. It must be above the variable factors. It is true that Kelsen does not deny the value of the study of sociology, history, etc. All that he emphasizes is that a theory of law must keep clear of these considerations.

According to Kelsen, jurisprudence is a knowledge of norms. A norm is simply a hypothesis that if one thing happens, the second thing should also happen. Jurisprudence consists of the examination of the nature and organisation of these normative propositions.

Kelsen draws a distinction between propositions of law and propositions of science. Propositions of science deal with what necessarily does happen. Propositions of law deal with what ought to happen. If 'A' commits theft, proposition of law is that he must be punished according to the law of the country. Even if a person is not punished for having committed an offence, that does not disprove the proposition. The proposition remains the same that if a person commits an offence, the law demands that he should be punished. The legal propositions deal with what ought to be. To quote Kelsen, "The principle according to which natural science describes its object is causality, the principle according to which the science of law describes its object is normativity."

According to Kelsen, the distinction between legal "oughts" and the other "oughts" is that the former is backed by force. To this extent the views of Kelsen and Austin agree. However, they differ in the elaboration of the idea. According to Austin, law consists of a command backed by a sanction. However, Kelsen rejects the idea of command as it introduces a psychological element into a theory which should be "pure". All that Kelsen is prepared to concede is that law is a "de-psychologized command, a command which does not imply a will in a psychological sense of the term". Another difference is that to Austin the sanction was something outside the law which imparted validity to the law. However, the view of Kelsen is that the legal "ought" cannot be derived from any "is" of fact outside the law. The validity of any legal "ought" is derived from some other legal "ought". It was in this way that Kelsen was able to analyse the Austinian sanction into rules of law. The view of Austin was that if a person committed a theft, he was to be punished according to law and that was the sanction. The view of Kelsen is that

the operation of the sanction itself depends on other rules of law. One rule says that if a man commits a theft, he should be arrested. Another rule says that after arrest, he should be brought for trial. There are rules which regulate his trial. Another rule says that if he is found guilty by a jury, the judge should sentence him. Still another rule says that the sentence should be executed by certain officials. Thus, sanction itself dissolves into rules of law and the distinction between law and sanction disappears.

The view of Kelsen is that in every legal system, no matter with what proposition of law we start, a hierarchy of "oughts" is traceable back to some initial or fundamental "ought" from which all the others emanate. This is called by him the *grundnorm* or the basic or the fundamental norm. This fundamental norm may not be the same in every legal system. But, it is always there. It is also not necessary that there should be one fundamental law. Every rule of law derives its efficacy from some other rule standing behind it. However, the *grundnorm* has no rule behind it. The *grundnorm* is the initial hypothesis upon which the whole system rests. We cannot account for the validity or the existence of the *grundnorm* by pointing to another rule of law. The *grundnorm* is the justification for the rest of the legal system. We cannot utilise the legal system or any part of it to justify the *grundnorm*. A *grundnorm* is said to be accepted when it has secured for itself a minimum of effectiveness. This happens when a certain number of persons are willing to abide by it. There must not be a total disregard of the *grundnorm*, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of support. When a *grundnorm* ceases to derive a minimum of support, it ceases to be the basis of the legal order and it is replaced by some other *grundnorm* which obtains the support of the people. Such a change in the state of affairs amounts to a revolution.

Kelsen does not give any criterion by which the minimum of effectiveness is to be measured. It is pointed out that in whatever way the effectiveness is measured, Kelsen's theory ceases to be "pure" at this point. The effectiveness of the *grundnorm* depends upon the sociological factors which are excluded by Kelsen himself.

The *grundnorm* is a starting point for the philosophy of Kelsen. The rest of the legal system is considered as broadening down in gradations from it, and becoming progressively more and more detailed and specific. The entire process is one of gradual concretisation of the basic norm and the focussing of the law to specific situations. It is a dynamic process. The application of a higher norm involves the creation of new lower norms. The application of the general norms by the judge to a particular situation involves a creative element in so far as the judge by his decision creates a specific norm addressed to one or other of the

parties. The final stage is the carrying out of the compulsive act. In the application of the general norm, the judge may be left with a large amount of discretion or he may consciously have to choose between alternative interpretations which the norm permits. The application of a general norm may also depend upon the act of the parties who may themselves come to some agreement.

Certain conclusions are drawn by Kelsen. There is no distinction between public and private law. That is due to the fact that all law enacts from the same *grundnorm*. Both public and private law are part and parcel of a single process of concretization. Another conclusion is that the legal system is an ordering of human behaviour. The idea of duty is the essence of law. This is evident in the "ought" of every norm. The idea of a right is not essential. It is said to occur "if the putting into effect of the consequence of the disregard of legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied." The idea of right is only a by-product of law. The idea of individual rights is not the foundation of criminal law today. Formerly, the machinery of law was set in motion by the injured person, but now the same is set in motion by the State itself. It is true that the idea of right is still the basis of the law of property. But it is possible that the same will be dispensed with in the future. The idea of 'personality' is simply a step in the process of concretization. By a 'person' is meant a totality of rights and duties. Kelsen rejects the distinction between 'natural' persons and juristic persons. Natural persons are biological entities and are outside the province of legal theory. The State is a system of human behaviour and an order of social compulsion. Law is also a normative ordering of human behaviour backed by force. Thus, the State and law are identical. It is wrong to say that the law is the will of the State because the State and law are identical.

Kelsen tried to apply the pure theory of law to international law. His theory demands that we must first find the *grundnorm*. If there are conflicting possibilities, Kelsen's theory provides no guidance on the point. All that Kelsen said was that the *grundnorm* is acceptable when it commands a minimum of support, and his theory proceeded on that basis. In the international sphere, there are two possible *grundnorms* and those are the supremacy of municipal law or the supremacy of international law. Every national legal order cannot recognise any norm superior to its own *grundnorm*.

According to Kelsen, the *grundnorm* of the international system postulates the primacy of international law. Nations in practice recognise the equality of each other's legal orders. The doctrine of equality implies that they recognise the existence of a *grundnorm* superior to the *grundnormen* of their own particular legal orders.

It is pointed out that the grundnorm of the international order is not clear at all. It may lie in the principle of *Pacta Sunt Servanta*. It is questioned whether the doctrine of *Pacta Sunt Servanta* or the equality of States has the minimum of effectiveness which Kelsen's theory demands. According to Julius Stone, "It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find." According to Prof. Friedmann, "Logically Kelsen should have been led to deny the character of law to international law in present international society."

Many critics point out that Kelsen does not provide any guidance to those who are engaged in the actual application of law. However, it is pointed out that this was not the object of the philosophy of Kelsen. He set out to achieve a limited object and that was to present an abstract picture of the legal structure and that exactly was the thing which was done by him. We cannot accuse him of not doing what he did not set out to do. The great contribution of Kelsen was that he demonstrated the unity of the legal system as well as the mechanics of its operation. This must be regarded as a valuable contribution to the study of law.

### **(7) National Jurisprudence :**

In the case of national jurisprudence, all the laws of a particular country are subjected to a scientific investigation. The work of Salmond in the field of jurisprudence falls in this category.

### **(8) Economic Jurisprudence :**

Economic jurisprudence is based on the presumption that economic forces alone control human activity and those have their influence on the development of law as well.

In this connection, we have to refer to the views of Karl Marx (1818-1883) and Friedrich Engels (1820-1895). Their view was that law was determined by the economic circumstances. Law was a super-structure on an economic system. Economic facts existed independently of and were antecedent to law. Bourgeois theories of law were distortions. There may be other super-structures and ideologies such as religion but they all had their ultimate validity in the economic background.

According to Marx, law is an instrument used by the economically ruling class to keep the subordinate class in subjection. The nature of law does not change even after the establishment of the dictatorship of the proletariat. The instrument of law was to be used by the working classes to crush the resistance of the capitalists. The nature of law as an instrument of domination did not change at all.

The view of Marx was that there was identity of law and State. The State came into existence as soon as there was an unequal distribution of commodities. Those who had property sought the protection of the State to protect it. In capitalist societies, the State and law were used by the capitalists to oppress and exploit the working classes. The same state of affairs continued even after the establishment of the dictatorship of the proletariat. The State and law were necessary even to force the people to work, to suppress crime and subversive activities and to maintain the inequality of distribution.

Both Marx and Engels were of the view that the State and law would wither away at some stage and would not be required at all. The view of Lenin was that the problem of criminals would be solved by the armed people themselves as simply and readily as any crowd of civilised people, even in modern society, separates a pair of combatants or does not allow a woman to be outraged. "We know that the fundamental social cause of excesses which consist in violating the rules of social life is the exploitation of the masses, their want and their poverty. With the removal of this chief cause, excesses will inevitably begin to wither away."

Critics point out that although the economic factor is very important, yet there are other factors which have to be taken into consideration and those also have their influence on law. It is pointed out that traffic laws and large parts of criminal law are not based on economics. The law which deals with violence to persons is due to weakness in human nature. It is not true to say that impulses such as anger, revenge, jealousy etc. are always rooted in economics. Much of family law is based as much on a religious foundation as on an economic foundation. In early society, religion played a more important part than economic considerations. In the light of the modern research, the purely economic aspect of origin of the State cannot be accepted. According to Dr. Bodenheimer, "History appears to be a very complicated and involved web of events. All attempts to analyse and explain it in terms of one denominator seem doomed to failure."

It is also pointed out that the picture of class struggle between the capitalists and workers as given by Marx is not correct. It is highly abstract and misleading. It is true that there has always been friction between classes but we cannot generalise it and call it a class struggle. According to Professor Corbin, "It helps us to realise that acts are always individual; that pain and pleasure, emotions and desires are always individual; that rules of law are made for individuals and that human and social welfare is, in the last analysis, always individual welfare. Labour is not in conflict with capital; but a labourer with no capital may fight a labourer with capital. 'Interests of personality' do

not conflict with 'interests of property', because only persons have interests either factual or jural. A State, a corporation, a group, a union, cannot act and can be affected only through individuals. Societal evolution can take place only by the evolution of individuals. Socialism is always some form of individualism, some combination of individual relations."

The view of Marx and Engels was that the wickedness of man is prompted by economic conditions. It is true that there is an element of truth in it, but there is absolutely no justification for such a sweeping proposition like this.

The view of Marx was that law was an instrument of domination and exploitation wielded by the capitalists against the workers. However, this does not seem to be true. In Soviet Russia, there are no capitalists and in spite of that laws flourish there in full vigour. Under the circumstances, it cannot be said that law is necessarily connected with domination and exploitation.

Another view of Marx was that both the State and Law will wither away. However, this has not happened in the Soviet Union. Neither the State has withered away nor the Law has withered away. Experience has shown that both of them are necessary for human beings.

The Revolution took place in Russia in 1917 and the dictatorship of the proletariat was established there. The views of Marx and Engels should have been applied there in actual practice. However, that was not done. The Communist party allowed in 1921 what was known as "State-controlled Private Enterprise." It was contended by the apologists of the Soviet Union that the so-called private rights were not the actual rights of private persons, but those rights were established by the State in favour of private persons in order to secure the public interest in the latter's welfare.

In order to meet the new situation, a new theory of law was given by Pashukanis (1891-1937). He developed what was known as the commodity-exchange theory. His view was that all law was built up of relations between individuals. Law was concerned with the exchange of commodities between individuals. The exchange of commodities called for individual rights and legal relationships and the various aspects of law reflected those relationships. Law presupposed theoretical equality and not subjection. Law was the peaceful means of settling the conflicting interests of persons who were deemed to be equal although they may be unequal in fact. In the ultimate perfect society, there was to be no conflict of interests of the individuals. There was to be unity of purpose and therefore there would be no need for law. Once the perfect society was reached, the national



economy would pass wholly into the hands of the State and law would come to an end. The Bourgeois Law had ceased to exist in Russia so far as production was concerned, but so far as capitalism was concerned, it was allowed to exist. The law of Russia still bore characteristics of Bourgeois Law.

The views of Pashukanis were adopted for some time because those were in line with the requirements of the Soviet Union. However, when things changed after 1930, Pashukanis was condemned. He was impeached and he disappeared in 1937. His critics pointed out that it was not true to say that law would wither away before the State. As a matter of fact, the institution of law had become strong in Soviet Russia by 1930. It was pointed out that the views of Pashukanis encouraged a nihilistic attitude towards the Soviet Law. His view that the Soviet Law bore the characteristics of Bourgeois Law was also attacked.

A new theory of law was given after 1937. That is to be found in "The Law of the Soviet State" by Vyshinski. According to him "In Soviet Law such a single and general principle is that of socialism—the principle of a socialist economic and social system resting on socialist property, annihilation of exploitation and social inequality, distribution in proportion to labour, a guarantee to each member of society of the complete and the manifold development of all his (spiritual and physical) creative forces and true human freedom and personal independence."

Under the present Soviet law, a sharp distinction has been made between the ownership of the means of production and ownership of the consumers' goods. The former is wholly in the State. The latter is open to individuals, "the home garden and a cow." The sale of the consumers' goods is also subject to control. In the sphere of production, all economic and business relationships are essentially transactions between the various organs of the State. The regulation of the relations between the various agencies is conducted on the basis that they are individual bodies. There are also the relations between the State and the individuals. The admission of individual ownership in consumers' goods involves a recognition of private rights to a certain extent. The disputes between the various agencies are settled by courts which have proved themselves to be impartial and independent. The observance of legislation is strictly enforced.

The great contribution of economic jurisprudence lies in the fact that it emphasises the important part played by the economic forces in the development and enforcement of law. However, the emphasis put is very much exaggerated. The attempts to do away with law have proved the fact that it is practically impossible to live without it.

### (9) Psychological Jurisprudence :

This science is based on an analysis of the human minds and its effect on legal institutions. What is wanted is that a psychological approach should be made to the penal system of a country and every effort should be made to bring it in line with the changing needs of the people. Likewise, the civil law should be analysed psychologically and thereby adapted to the needs of the people. It is pointed out that crime is largely a disease of the mind and deserves treatment instead of punishment. Every effort should be made to remove the criminal instincts and impulses of the people. The five divisions of the criminals are those who commit crimes from passion, those who do so because external restraints are not sufficient to deter them from submitting to temptation, those who have acquired criminal habits as a result of their social environments or some other similar cause, those who are suffering from some form of insanity and those who commit crimes as a result of instincts which have been transmitted to them by inheritance from some earlier stage of human development. According to Vinogradoff, "Of all methods of penalising culprits, the one most usual in our days, imprisonment, appears to be the most unsatisfactory. There is nothing to recommend it but the ease of its application to the large numbers of delinquents. It has been described by all competent observers as an active incitement to further wrong-doing, and it is to be hoped that the difficulties attending other methods will not prevent civilized countries from introducing and carrying out improved methods of penalties. In any case, the fruitful development of the methods advocated by reformers is dependent on the recognition of one great principle—the idea of the individualisation of the penalty. This means that the punishment has to fit the moral case of the criminal as the drug has to fit the pathologic case of the sick man. No abstract equations will do : the judge stands to the criminal in the position of the doctor who selects his remedy after diagnosing the disease and the resources of the patient's organisation."

### Realist School of Jurisprudence

Certain writers in America and Sweden are said to belong to the Realist School of Jurisprudence. The American realists are practising lawyers or law teachers who seek to approximate theory to legal practice. In Sweden, a small group of jurists with the training of philosophers have addressed themselves to the same problem. Realism provides in many ways a very interesting, novel and vigorous force in contemporary legal thought. The bond which is common to the various writers who have been called realists is "scepticism as to some of the conventional legal theories, a scepticism stimulated by a zeal to reform, in the interests of justice, some court-house ways."

### **The American Realists**

The American realist movement is a combination of the analytical positivist and sociological approaches. It is positivist in the sense that it regards the law as it is and not as it ought to be. The ultimate aim is to reform the law. But that cannot be done without understanding the law. Law is the product of many factors, and therefore the realists are interested in those sociological factors which influence the law. The realists share with the sociologists an interest in the effects of social conditions on law as well as the effect of law on society. The realists put too much emphasis on judges. To them, law is what judges decide. That is partly due to the fact that judges have played a very important part in the growth of the American Constitution and law. The approach of the realists is essentially empirical. Their view is that the decisions of the judges are brought about by ascertainable facts. Some of them are the personalities of the individual judges, their social environment, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology, etc. The importance of the personal element is not new. But the contribution of the realists lies in the fact that they have put too much emphasis on it. On this very point emphasis had been put by Gray in these words: "Suppose, Chief Justice Marshall had been as ardent a Democrat (or Republican, as it was then called) as he was a Federalist. Suppose, instead of hating Thomas Jefferson and loving the United States Bank, he had hated the United States Bank and loved Thomas Jefferson, how different would be the law under which we are living today."

It is pointed out that the realist movement in America can be traced to a paper of Mr. Justice Holmes written in 1897. In that paper, Holmes put forward a novel way of looking at law. His view was that if we wanted to know what law was, we must consider it from the point of a bad man who was concerned only with what would happen to him if he did not do certain things. According to Holmes, "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law."

The view of Prof. Llewellyn was that law was what lawyers did. "This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailors or lawyers are officials of the law. What these officials do about disputes is, to my mind, the law itself."

According to Llewellyn, there has to be a conception of law in flux and of the judicial creation of law. Law is a means to social ends. Any part of it has constantly to be examined for its purpose and effect, and to be judged in the light of both and their relation to each other. Society changes faster than law. There

is a constant need to examine how law can meet the contemporary social problems. The ideas of justice and teteology have to be expelled from jurisprudence. They have to be put aside while investigating what the law does and how it works. To define law solely in terms of legal rules is absurd. There are many influences which have to be considered in connection with law.

The realists have attempted studies of case law from a point of view which regards the judgment as a subsequent rationalisation by the judge in conventional legal terminology of a decision which he has already reached. The enquiry into what judges do has opened up further lines of investigation. In this way, the study of personalities and psychology of judges and juries has come in. The realists study the different results reached by the courts and the extent to which courts are influenced by the procedural machinery which exists for the administration of law. The realists would like to broaden the sphere of research and extend the same not only to appellate courts but also to the original courts. Judge Jerome Frank has commented on Cardozo in these words: "Cardozo, most of his days an appellate court lawyer or an appellate court judge, suffered from a sort of occupational disease, appellate-court-itis."

The realists have been divided into two categories. The "*rule sceptics*" reject legal rules as providing uniformity in law. They try to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics, etc. Professor Llewellyn belongs to this school. The "*fact sceptics*" depart from the whole idea of real certainty. They point to the uncertainty of establishing facts themselves which is done in trial courts and not in appellate courts. Facts have to be established largely by witnesses who are fallible and who may not be telling the truth. It is impossible to say with any degree of certainty how fallible a particular witness is likely to be. All persons, judges and jurymen alike, form different impressions of facts or groups of facts. Those differences are due to various factors. Frank belongs to this school. He criticises the real sceptics in these words: "They often call their writings jurisprudence; but, as they almost never consider juries and jury trials, one might chide them for forgetting 'jurisprudence'."

According to Judge Jerome Frank, the craving for certainty and guidance with which men regard the law is partly due to their desire for security and safety which we all carry within us as a legacy of our childhood. The child trusts the wisdom of his parents for his security. The adult has his faith in human institutions for his security. The quest for certainty in law is in effect a search for a "father-symbol" to provide security. The other explanations given by him are the religious impulse, the aesthetic impulse, professional habits, protection of vested interests, instinct to seek security and certainty, interest in peace and quiet, imitation,

devotion to custom, inertia, laziness, stupidity, mental structure, language and word-magic.

According to Frank, rules are moral word-formulæ. If the rules are to have any meaning at all, that meaning must be found in the facts of real life to which they correspond. "We must think things not words, or at least, we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true." The original view of Frank was that "law as to any given situation is either (a) actual law, *i.e.*, a specific past decision as to that situation, or (b) probable law, *i.e.*, a guess as to a specific future decision." However, later on, he hesitated to use the word law. To quote him, "Instead, I would state directly—without any intervening definition of that term—what I was writing about, namely, (1) specific court decisions, (2) how little they are predictable and uniform, (3) the process by which they are made, and (4) how far, in the interest of justice to citizens that process can and should be improved."

Critics of the American Realist School point out that it is wrong to say that what judges say is never a guide to what they do. Judges sometimes say that they are bound by rules because their decisions have in fact been governed by them. Even when they circumvent rules, they do so in a manner which conceals the fact that they are doing so. They all the time give the impression that they are bound by rules. The realists do admit the part played by rules but their writings have created a wrong impression about the same.

The realists have not said anything about the nature of law, which can be called novel. They have not rejected rules and concepts altogether from the idea of law. Their contribution lies in the fact that they have emphasized certain aspects of law which were neglected before. The rule sceptics really draw attention to the innumerable personal and other factors that lie behind judicial decisions. The fact sceptics put emphasis on the uncertainties in the establishment of facts themselves. The realists have given a picture of law from the point of view of what the judges do. They haven't given importance to the point of view of a legislator. Their point of view is helpful in a system of law which gives importance to the judiciary but not to a system in which the judges are strictly controlled by the government and their discretion is very much restricted.

In addition to the American realists in law, it is desirable to refer to other writers on the subject. In his search for the reality of law, *Petrazhitzky* (1867-1931) combined an attitude of philosophical positivism and subjective sociology. He tried to find realistic explanations founded on observation and experience. He emphasized the need for a realistic and empirical approach. According to him, observation could be internal and external.

We can observe our own mental processes and the external movements which they produce.

According to him, no such thing as rights, duties, etc., were to be found in the outside world. His view was that the rights, duties and the like had no existence in a world of fact, but they did exist in the mind. We do not find anything corresponding to rights, etc., in the minds of those to whom we ascribe them. The reality of rights and duties and also the reality of law was psychological. It was to be found only in individual experience. Statutes, judicial decisions, customs, etc., were law only as projections from the minds of the people. Law was to be distinguished from other psychological experiences only by means of psychological analysis. Psychological development being inadequate, Petrazhitzky would like to supplement it. To the three elements already accepted, he added the fourth one called "impulsion". Those were complex experiences which combined the passive cognitive and emotive elements with the active volitional element. Impulsions were sub-divided into two categories. There were impulsions where the active or volitional element was prompted by a passive element. There were impulses where the active element was prompted by a mental image on some ideal course of conduct. The ideal course of conduct was determined by a judgment approving or disapproving of the conduct, not on grounds of utility, but simply on a general standard of the goodness or the badness of the conduct in itself.

Petrazhitzky divided law and morals into two categories, positive and intuitive. To the positive category belonged all cases where the judgment determining the ideal pattern of behaviour was formed with reference to normative facts such as statutes, judicial decisions, etc. In the intuitive category, the judgment was formed without reference to such facts. Law was further divided into official and unofficial law depending upon the type of agency that used it.

**Hagerstrom** (1868-1939) was the founder of the realist movement in Sweden. He wrote a good deal on Roman Law. He denied existence of objective values. It appeared to him that there were no such things as goodness and badness in the world. The words represent simply emotional attitudes of approval and disapproval towards certain facts and situations. The word 'duty' only expresses an idea, the association of a feeling of compulsion in regard to a particular course of conduct. There is no possibility of any science of the "ought". All questions of justice, aims, purposes and reality of law are matters of personal evaluation. They are not susceptible to any scientific processes of examination.

Hagerstrom examined the concepts of Classical Roman Law and came to the conclusion that those were rooted in magical beliefs. They were developments of the primitive belief in the

power of words to affect happenings in the world of fact. The conception of obligation was a magical bond giving power to the creditor over the debtor. Power over property, *dominium* or ownership was also a magic power. The mode of conveyance, *manipatio*, was a ceremony based on magic. Critics point out that it is not quite proper to say that the concepts of Classical Roman Law were based on word-magic.

**Professor Olivecrona** (1897- ) does not define law. To quote him, "I do not regard it as necessary to formulate a definition of law. A description and an analysis of the facts is all that will be attempted."

He approaches the discussion from the point of view of the question of the binding force of law. His view is that there is no such thing as "the" binding force behind law. There may be many attempts to find some objective fact in which it resides. Natural lawyers find the binding force of human law in natural law. There are others who find the binding force of law in the consent of the governed. This view is unreal because at no time are the subjects of a system of law asked whether they consent to be bound by it or not. Once consent is withdrawn, the law ceases to be binding, but that is not actually the case. Another view is that the binding force lies in the will of the State. The defect in this view is that it is difficult to distinguish the will of the State from the will of the individuals. It is also difficult to discover the individual or group of individuals in whose will the binding force of law can be said to reside. Likewise, it cannot be said that the binding force of law is derived from the unpleasant consequences that follow if law is broken. There are many cases when a law is broken and still no unpleasant consequences follow. If we put our hands in the fire we burn ourselves, but it cannot be said that there is any binding rule that we must not put our hands in the fire.

Professor Olivecrona rejects the idea of "the" binding force of law as illusory and meaningless. It is not an observable fact in the social context of which law is a part. "The" binding force of law is a mirage of language. It exists only as an idea in individual minds. Most of us have a feeling of being bound by the law. This is different from saying that there is a binding force existing somewhere.

According to Professor Olivecrona, the ideas of duty and rule involve the idea of action and an imperative mode of expression. The feeling of being bound is associated with the pronouncements made by certain agencies and certain procedures such as legislation, judicial decisions, etc. To quote him, "Constitution law-givers gain access to a psychological mechanism, through which they can influence the life of the country...the significance of legislating is not that the draft acquires a binding force by being

promulgated as a law. The relevant point is that the provisions of the draft are made psychologically effective. And this result is attained through the use of a certain form, which has a grip over the mind of the people." Another explanation of the feeling of being bound is an immemorial tradition. The organised force of the community can be brought to bear in connection with them.

According to Professor Olivecrona, the imperative patterns of conduct and rules which are called law, are distinguishable from other imperatives by virtue of a certain feeling of being bound that is associated with the former. This feeling is not the same in regard to any other kind of imperative. The feeling of being bound by law is psychologically associated with certain agencies when they follow certain procedures. Law becomes a set of independent imperatives prescribed by those agencies.

It is not proper to criticise Professor Olivecrona on the ground that he does not give any guidance for the solution of legal problems. The reason is that that was not the scope of his work. He cannot be criticised for not having said something on what he never set out to say. His object was a very limited one and that was to give a formal picture of law as it is.

### **Continental Jurisprudence**

The treatment of the subject by continental jurists is different from that of English jurists. An English writer on jurisprudence is concerned mainly with the analytical treatment of the fundamental principles of the English legal system but a continental jurist worries himself with ethical, moral, metaphysical and philosophical considerations also. The continental writers are more metaphysical than scientific. This is partly due to the fact that the English word "law" denotes law alone and is not bothered about moral rules or natural law. In the case of Europe, the terms "Recht", "Droit" and "Diritto" mean not only law but also right and justice. No wonder, there is a temptation on the part of a continental writer to deal with abstract justice in his study of law. The term law and justice are confused and not kept separate.

Prof. Friedmann points out certain points of difference between Anglo-American jurisprudence and Continental jurisprudence. According to him, Continental jurisprudence has been decisively influenced by the reception of Roman law but that is not so as regards the Anglo-American law. The latter is largely the product of gradual historical growth and therefore still shows considerable elements of feudalism. It is for this reason that Scottish law might be ranked with Continental jurisprudence rather than with English jurisprudence. All Continental systems are essentially codified, but Anglo-American law is still based on the common law. Judicial decisions in Continental system are



not a primary source of law but only a gloss on the law. In Anglo-American law, precedent is one of the principal sources of law. Anglo-American law centres round a decision of individual problems and builds up the principle from case to case. Under the Continental system, they proceed from general rules to individual decisions. Anglo-American legal thinking gives a predominant place to law courts. Continental jurisprudence thinks of law not only in terms of litigation but also in terms of its general function. The dualism of common law and equity in Anglo-American law is unknown to Continental systems where equity is a principle of interpretation applied to any legal question, but not a special body of law. All Continental systems distinguish in substance and procedure between private law and administrative law. The former deals with legal relations between subjects as equals, the latter deals with legal relations between public authority of all types and the subject. Anglo-American law rejects that distinction and adheres, at least in theory, to the principle of the equality of all before the law. The more abstract and generalising approach to law of Continental jurisprudence has been conducive to the development of legal philosophy and the pragmatic and empiricist character of Anglo-American law has had the opposite effect. The result is that the analytical school of jurisprudence holds the field in Anglo-American law but there is an infinite variety of legal theories under the Continental system.

### **Philosophical Jurisprudence**

According to Salmond, philosophical jurisprudence is the meeting point and common ground of moral and legal philosophy, of ethics and jurisprudence. Kant made use of the philosophical methods in tackling legal problems in his "Philosophy of Law". He assumed a universal principle of law which he called the categorical imperative and which required that "every one should act externally in such a manner that the free exercise of his will may be able to co-exist with the freedom of all others." Law was defined by Kant as "the sum total of the conditions under which the personal wishes of one man can be reconciled with the personal wishes of another man in accordance with a general law of freedom." The philosophical school is concerned with the relation of law to certain ideals which law is meant to achieve. It tries to find out the purpose of law and the methods by which the same is to be achieved. Law is neither the arbitrary command of a ruler nor the creation of historical necessity. Law is the product of human reason and its purpose is to elevate and ennoble human personality.

According to Lord Radcliffe, 'It is just at this point that one begins to ask : What then does our system of law stand for to the ordinary citizen who is called upon, day in, day out, to rule his conduct by it and to subordinate to it his own, often contrary, interests and desires ? It is at this point too that, to my mind at

any rate, the work of the analyst fails to provide the material that one needs. You may say, with one well-known theorist, that the whole matter of jurisprudence is positive law and that itself is nothing but the commands addressed by political superiors to political inferiors; or, with another, that law can best be understood with the aid of logic and, so understood, can be resolved into a system or hierarchy of norms prescribing what always ought to happen in given circumstances, so long as there exists one basic norm. You may follow the historical jurists and treat law as the product of silent anonymous forces working in the life and history of a society: or the sociological jurists and find law not in legal propositions but in an interaction of legal institutions; or the ultimate realists and decline to see in law any substance that lies behind the bare action of the courts in pronouncing on the parties' rights. But, at the end of it all, there is something still to be reckoned with of which these accounts do not take care. Men look for law to be something more than these bare dissections. Historically it has been one of the strong bonds of society that the law should be regarded as expressing and being controlled by some higher value than mere command, or custom, or logical reason, or the say-so of a judge; and if the liberal political society has cut itself free from all these old and potent associations by assigning to law a position of irrevocable neutrality, it has thrown a strain upon the social fabric which may, of course, be endurable but of which we should at least take anxious notice.

"Law is expected to be at one and the same time a number of inconsistent things. It is expected to be in general consonance with the ideas and beliefs of its day. If it is markedly out of touch with those ideas and beliefs, it will forfeit both respect and ready adherence. It is a great strength of the democratic liberal State that it possesses in its law-making assembly an instrument that can at short notice adjust the existing body of law so as to take account of changes in what men look upon as the fitness of things. So too in his interpretation of all that part of the law which is not subject to legislative adjustment the judge on the bench is himself expected to keep his mind constantly sensitive to the underlying beat of his own period of history. 'My duty as a judge', said Justice Cardozo, 'may be to objectify in law not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of men and women of my time'. But then the argument turns round upon itself, because those same men and women, as I believe, want the law to stand to them for something which is not just a reflection of their own philosophies and convictions and aspirations. They value and would not willingly part with their representative legislative assemblies which make for them, at however remote a distance, their own law in their own name: but whether the powers of such assemblies are or are not formally limited by constitutional guarantee, I think that the ordinary citizen would be both surprised

and dismayed to have it brought home to him that his legal system was, theoretically, at the mercy of such an assembly and could be radically remodelled by it, as it were, overnight. Similarly, he feels in his bones that the law which the learned judge interprets to him from the bench is the voice of something more stable and more fundamental than the aspirations or convictions either of himself or of the judge. He is not concerned or qualified to analyze the nature of its sources : but it must present to him the general aspect of something which is old enough to be established and so tested by time and wise enough to represent rather the impersonal consensus of wisdom than the excellence of judgement of this law-giver or that". (PP. 8-11, *The Law and its Compass.*)

### Suggested Readings

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|---------------|---|
| Allen         | : Law in the Making.                                    |
| Amos          | : View of the Science of Jurisprudence.                 |
| Barnes (Ed.)  | : An Introduction to the History of Sociology.          |
| Bodenheimer   | : Jurisprudence.  |
| Buckland      | : Some Reflections on Jurisprudence.                    |
| Clark         | : Practical Jurisprudence.                              |
| Dias & Hughes | : Jurisprudence.  |
| Duguit        | : Law in the Modern State.                              |
| Ebenstein     | : The Pure Theory of Law, 1945.                         |
| Ehrlich       | : Fundamental Principles of the Sociology of Law, 1936. |
| Frank         | : Law and the Modern Mind.                              |
| Friedmann     | : Legal Theory.   |
| Garlan        | : Legal Realism and Justice.                            |
| Hagerstrom    | : Inquiries into the Nature of Law & Morals.            |
| Hibbert       | : Jurisprudence.  |
| Holland       | : Elements of Jurisprudence.                            |
| Hostie        | : Outlines of Jurisprudence.                            |
| Ihering       | : Law as a Means to an End.                             |
| Jenks         | : New Jurisprudence.                                    |
| Jones         | : Historical Introduction to the Theory of Law.         |
| Jones         | : The Nazi Conception of Law.                           |
| Kelsen        | : The Communist Theory of Law.                          |
| Lee           | : Historical Jurisprudence.                             |
| Lindley       | : Introduction to the Study of Jurisprudence.           |
| Lloyd         | : Introduction to Jurisprudence (1959).                 |
| Maine         | : Ancient Law.  |
| Olivecrona    | : Law as Fact.  |
| Osborne       | : Jurisprudence.  |
| Patterson     | : Jurisprudence.  |
| Paton         | : Jurisprudence.  |
| Pound         | : Interpretations of Legal History.                     |
| Pound         | : Jurisprudence.  |
| Puchta        | : Outlines of Jurisprudence.                            |

- Salmond : Jurisprudence.  
Savigny : On the Vocation of our Age for Legislation & Jurisprudence.  
Schlesinger : Soviet Legal Theory.  
Stone : The Province and Function of Law.  
Vinogradoff : Introduction to Historical Jurisprudence.

## CHAPTER II

### THE NATURE OF LAW

#### Definition of Law

In the words of Morris, "To a zoologist, a horse suggests the genus mammalian quadruped, to a traveller a means of transportation, to an average man the sports of kings, to certain nations an article of food." The same is the case with law. Law has been variously defined by various individuals from different points of view and no wonder there is no unanimity of opinion regarding the real nature of law. There is a lot of literature on the subject of law as such and in spite of that the views differ. However, it is desirable to refer to some of the definitions given by various writers.

According to Keeton, "A law is a rule of conduct, administered by those organs of a political society which it has ordained for that purpose and imposed in the first instance at the will of the dominating political authority in that society in pursuance of the conception of justice which is held by that dominating political authority or by those to whom it has committed the task of making such rules."

According to Vinogradoff, law is "a set of rules imposed and enforced by a society with regard to the distribution and exercise of power over persons and things."

According to Erskine, "Law is the command of sovereign, containing a common rule of life for its subjects and obliging them to obedience." According to Pound, "Law is the body of principles recognized or enforced by public and regular tribunals in the administration of justice." According to Gray, "The law of the State or of any organized body of men is composed of the rules which the courts—that is, the judicial organs of that body—lay down for the determination of legal rights and duties." According to Wilson, "Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government." According to Green, "Law is the system of rights and obligations which the State enforces."

According to Markby, "Law is a term which is used in a variety of different meanings; but widely as these differ, there runs throughout them the common idea of a regular succession of events governed by a rule which originates in some power, condition or agency upon which the succession depends."

According to Blackstone, "Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions whether animate or inanimate, rational or irrational. Thus, we say, the laws of gravitation, of optics or mechanics, as well as the laws of nature and of nations."

According to Montesquieu, "Laws in the widest sense of the term are necessary relations derived from the nature of things. The Deity has His laws. The material world has its laws, men have their laws."

According to Holland, "The term law is employed in jurisprudence not in the sense of the abstract idea of order, but in that of the abstract idea of the rules of conduct." According to Sir Henry Maine, "The word law has come down to us in close association with two notions, the notion of order and the notion of force." According to Demosthenes, law is "the common institution of the State according to the determination of which every man who lives in the State must order his life."

According to Jellinek, "Law is minimum ethics." According to Stammler, "All positive law is an attempt at just law." According to Holmes, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts."

According to Edward Jenks, "Law may be defined, provisionally, as the force or tendency which makes for righteousness. Of the origin of this force, little, if anything, is known; it is one of the ultimate facts of the universe with which every observer has to reckon."

Korkunov defines law as "the means of peaceable regulation of the external relations of persons and their social communities among themselves."

According to Cardozo, "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law." This view emphasizes the fact that law is a process. It is not a series of particular commands. It is rather a body of principles slowly evolved by the decision of concrete cases. It is pointed out that although this definition is a useful description, it can hardly be called a definition. Much law today never comes before the courts because recourse is prohibited in many cases. We are so accustomed to the development of law by courts that we forget altogether the fact that law can be developed and applied in other ways also. It can be enforced by a minister who is given certain powers by law to dispose of certain cases finally.

According to Paton, the term "law" may be defined from

the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist or the lawyer. Law may be used in a metaphorical sense. Law may be defined firstly by its basis in nature, reason, religion or ethics. Secondly, it may be defined by its source in custom, precedent or legislation. In the third place, it may be defined by its effect on the life of society. Fourthly, it may be defined by the method of its formal expression or authoritative application. In the fifth place, it may be defined by the ends that it seeks to achieve. Paton himself defines law in these words: "Law may be described in terms of a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system of law normally sets up that type of legal order known as the State, but we cannot say *a priori* that without the State no law can exist."

According to Pollock, "In English we use the word Law in a concrete sense to mean any particular rule, having the nature of law in the abstract sense, which is expressly prescribed by the supreme power in the State, or by some person or body having authority for that purpose, though not generally supreme. A law, in this sense, is the exercise of a creative or at least formative authority and discretion; the power that made it might conceivably have chosen to make it otherwise. The rule is such because a definite authority has made it so; it lay in the law-giver's hand what it should be. There is an element, at least, of origination. Application of existing principles, however carefully worked out, and however important it may be in its results, is not within the meaning. Therefore, although declarations of legal principles, or interpretations of express laws, by courts of justice may well be said to form part of the law, and so to be law in the abstract sense, we cannot say of any such declaration or interpretation that it is a 'law'. When we are using the term in this concrete sense it is not only correct enough for ordinary political purposes, but correct without qualification, to say that 'Laws are general rules made by the State for its subjects.' The plural 'laws' is ambiguous, and the context must determine in which sense it is used. It may cover both meanings, as when we speak of 'the laws of England' as including the whole body of English law, both what has been enacted by Parliament and what is derived from other sources. It is quite possible for the administration and development of 'law' and the production of concrete 'laws' to be in the same hands to a greater or less extent. Thus a decision of an English Superior Court is law unless and until reversed or overruled by a higher Court; a rule of procedure made by the Judges under the powers conferred on them by the Judicature Acts is a law, though English-speaking lawyers do not commonly call it so, because it

is more convenient to use the appropriate term 'Rule of Court.' In like manner an Act of the Imperial Parliament, or an Order in Council, or an Ordinance made by the Legislature of a Crown Colony, is a law, though almost always called by the more specific name.

"This concrete usage is extended to all sorts of express rules made and recorded for the guidance of human action in all sorts of matters, both serious and otherwise. Clubs and societies have their laws; there are laws of cricket and laws of whist. As might be expected, the distinction between the concrete and the abstract sense is not always exactly observed in popular usage. One might say without impropriety: 'It is a law of journalism that an editor shall not disclose the authorship of an unsigned article without the writer's consent', although 'rule' or 'custom' would be more accurate.

"It is proper to note that the ambiguity of the word law seems peculiar to English among the chief western languages. Law in the abstract, the sum of rules of justice administered in a State and by its authority, is *ius* in Latin, *droit* in French, *diritto* in Italian, *Recht* in German. For the express rule laid down by an originating authority these languages have respectively the quite distinct words, *lex*, *loi*, *legge* (the French and Italian words being modern forms of the Latin one), *Gesetz*. Thus an Englishman tends, consciously or not, to regard enacted law as the typical form; it is hard for him not to identify laws (as the plural of 'a law') with Law. Frenchmen and Germans, on the other hand, are more likely to regard *loi* or *Gesetz* as merely a particular form of *droit* or *Recht*, and not necessarily the most important form.

"On the other hand, these Latin and other names for law in the abstract (*ius*, *droit*, *diritto*, *Recht*) correspond also to our distinct English word right in its substantive use. This leads to verbal ambiguities, and gives occasion for confusions of thought, which are perhaps not less inconvenient than any consequences of law having to stand for both *ius* and *lex* in our language." (Jurisprudence and Legal Essays, PP. 8-19).

According to Justice Holmes, "Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts." Again, "the prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by law." According to Lord Moulton, "Law is the crystallized common-sense of the community." According to Pound, "Law is the body of principles recognized or enforced by public and regular tribunals in the administration of justice." According to Dr. Johnson, "Law is the last result of human wisdom acting upon human experience for the benefit of the public." According to Miller, "A positive law in its widest



sense may be defined as the expression of the idea of right involved in the relation of two or more human-beings."

According to Sir John *Salmond*, "The law may be defined as the body of principles recognised and applied by the state in the administration of justice". In other words, the law consists of the rules recognized and acted on by the courts of justice. However, Goodhart criticizes this definition in these words : "Admirable as this definition may be as an ideal, it can hardly be expected as a practical solution of the question. The obvious answer to it is that it does not include laws which are unjust. Such rules nevertheless are laws. A definition of the whole must include all the parts. A minor criticism of this definition is that certain laws are recognized and enforced solely by administrative officers and the courts of law are not permitted to take cognisance of them. This has always been true on the Continent and can even be found in exceptional cases in England, as, for example, in the case of the exclusion of aliens.. As Professor Pound has pointed out, administrative law has been developing rapidly in the United States and many questions are no longer justiciable in the courts of laws. Is not the primary purpose of the law order rather than justice? Law and order are two terms which cannot come into conflict. Law and justice are terms which, unfortunately, are frequently contrasted. According to Kecton, the only valid objection to the argument of Goodhart is that it tends to subordinate the idea of justice to the idea of order and if that is done, it would be bad for the science of jurisprudence and law itself.

According to Vinogradoff, the administration of justice is merely the application of law to the particular facts of the case and to define law in terms of justice is to reverse logical order of ideas. Moreover, to define law in terms of justice and to define justice in terms of law, is to argue in a circle and one is not going to arrive at any useful conclusion. To quote him, "In defining law by reference to the administration of justice, you have reversed the proper order of ideas, for law is first in logical order and the administration of justice is the second. The definition runs in a circle for it is not permissible to say that the law is the body of rules observed in the administration of justice, since this function of the State must itself be defined as the application and enforcement of law." The definition of *Salmond* begs the very question it seeks to answer. It assumes that law is logically subsequent to the administration of justice but the fact is quite the reverse.

The reply of *Salmond* is that the above objection is based on a misunderstanding of the essential nature of the administration of justice itself. What actually happens is that the administration of justice precedes law. Law is merely a means and justice is the end. The means have to be defined in terms of the end. It is possible for the courts to give justice to the people without referring to any fixed rules of law. The decision may be given by the

judges according to equity, good conscience and natural justice. This exactly was the case in England up to 1873 when equity cases were disposed of by the Chancellor. The same was true about India before its laws were codified during the 19th century. Salmond points out that judicial discretion cannot be eliminated altogether. There are always some cases for which there is no provision in the law of the country and the same have to be disposed of according to what seems to be just to the judges concerned. According to Hooker, "Laws are in theory the voices of right reason, they are in theory the utterances of justice speaking to men by the mouth of the State; but too often in reality they fall far short of this ideal." The legal rules may be amplified and elaborated in every possible way but in spite of that, there is always scope for judicial discretion.

According to Salmond, "Law is law not because the courts are under any obligation to observe it, but because they do in fact observe it. No rule that is not thus in fact observed in accordance with the established practice of the courts is a rule of law, and, conversely, every rule that is thus in fact observed amounts to a rule of law. It is to the courts of justice and to them alone that we must have recourse if we wish to find out what rules are rules of law and what are not. In the last resort, the authority of the law over the courts themselves has its source merely in the moral obligation of the judges to observe their judicial oaths and fulfil their appointed functions by administering justice according to law."

Regarding Salmond's definition of law, Paton observes thus : "The purpose of law is essential to an understanding of its real nature; but the pursuit of justice is not the only purpose of law : the law of any period serves many ends and those ends will vary as the decades roll by. To seek for one term which may be placed in a definition as the only purpose of law leads to dogmatism. The end that seems most nearly universal is that of securing order, but this alone is not an adequate description ; indeed, Kelsen regards it as a pleonasm, since law itself is the order of which we speak."

Again, "we must distinguish clearly between justice and law, for each is a different conception. Law is that which is actually in force, whether it be evil or good. Justice is an ideal founded in the moral nature of man. The conception of justice may develop, as man's understanding develops, but justice is not limited by what happens in the actual world of fact. It is wrong, however, to regard law and justice as entirely unrelated. Justice acts within the law as well as providing an external test by which the law may be judged, *e.g.*, justice emphasizes good faith and this conception has greatly influenced the development of legal system".

According to *Jerome Frank*, Salmond restricts law only to those rules which are enforced by the State and does not take into con-

sideration those rules which are enforced by voluntary associations.

According to Pound, Salmond's definition reduces law to a mere collection of isolated decisions. According to Frank and Llewellyn, it is narrow and ignores administrative law. However, it is pointed out that administrative law has its authority in the constitution of the State and cannot be considered as a part of the ordinary law of the land or of civil law.

According to Gray, the definition is very wide in its scope. Courts apply and enforce much more than what is really speaking law, *e. g.*, agreements of parties. But this objection is based on the definition of law as a command as given by Austin. Anything which is not a command of the sovereign is not law. But the view of Austin is that such agreements are also law although they apply only to a class of persons.

It cannot be denied that Salmond puts emphasis on the purpose of law in his definition. Undoubtedly, the end of law is justice and law can appropriately be described in terms of justice.

### **Austin's Theory of Law (Imperative Theory of Law)**

Austin was a soldier in the army and no wonder his conception of law was influenced by the feeling that the king was the absolute sovereign of the State to whom all others owed obedience. The will of the king was the law of the people and the machinery of the State was to be employed to enforce that law. Nothing was binding on the people unless and until the same was approved of by the king.

According to Austin, positive law was the proper subject of jurisprudence. Laws were of two kinds, *viz.*, divine law and human law. Divine law was given by God to men. Human laws are set by men for men. Human laws are of two kinds. There are certain human laws which are set by political superiors and are called positive laws and there are others which are not set by political superiors. To this category belong the rules of a club or any other voluntary association.

According to Austin, "Every positive law is not by a sovereign person or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." Again, "Positive laws, laws strictly so-called, are one particular species of set rules, and consist only of those which are set by a sovereign person or a sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or supreme." Again, "Positive law consists of commands set as general rules of conduct by a sovereign to a member or members of the independent political society wherein

the author of the law is supreme."<sup>1</sup>

Austin's definition of law contains *two essential elements* and those are the command and sanction. A *command* is the expression of a wish or desire to another so that he shall do a particular thing or refrain from doing a particular thing. In the case of non-compliance with the command, he was to be visited with certain evil consequences. There are three essential elements of a command and those are a wish or desire of a person that another person shall do or refrain from doing a particular act, the expression or intimation of that wish or desire to the other and the evil to proceed from the former in case of non-compliance with the wish. The power to inflict evil must be there and it should be intended to be exercised in the case of non-compliance.

Duty implies the obligation to comply with command on the pain of the evil which is to follow in case of non-compliance. Right is capacity to direct another person to do a particular thing or not to do a particular thing. Sanction is the evil which is to follow in case of non-obedience. The three conceptions of duty, right and sanction are intimately connected and "each of them signifies the same notion ; each denotes one aspect of it and connotes the residue."

Commands are of two kinds, particular and general. A particular command is concerned with a particular act and a general command is concerned with a class of acts. The view of Blackstone and Markby was that a command is general if it is addressed to a class of persons in general. A command is particular if it is addressed to individuals only. The view of Austin was that the distinction between general and particular command should be based on the generality of acts contemplated by the command and not on the number addressed by it. Even if a command is addressed only to one person, it is a general command if it prescribes the course of conduct. Generality is essential to law. The State cannot deal with particular cases as they arise. It must deal with all the cases. Although every law is a command, every command is not law. To quote Austin, "A law determines acts of a class, a particular command determines merely a specific act."

It has already been pointed out that the *sanction* behind law is the evil which is to be inflicted in case of disobedience. The punishment is inflicted by the sovereign. Austin defines

1. Compare the following definition of law as given by Roguin, "Law (le droit) is a legitimate command (ordre legitime), given to a human subject, individual or collective, bound to execute it for the benefit of another subject entitled to claim, being a command so that one external fact be followed by another external fact, and that, in default by a further external fact, and so on, physical constraint being applied at certain links in the chain of acts commanded."

*sovereignty in these words: "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society."* It follows from above that the bulk of society must be obedient to the common superior. They must owe habitual or permanent obedience to the sovereign. An occasional or temporary obedience is not enough. The sovereign must possess superiority over the people. According to Austin, superiority implies "the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes." Superiority is of two kinds: natural and positive. God is the natural superior of all. Positive superiority implies superiority in society. The sovereign occupies a supreme position in society. It is on account of his supreme position in society that the laws of the sovereign are called positive laws by Austin. The sovereign must be common to the whole society and there cannot be two sovereigns for the same society. The sovereign must be independent of all control, whether internal or external. It must not obey any other authority. The powers of the sovereign are unlimited and indivisible.

Austin emphasizes the relations between law and sovereign. Law is law because it is made by the sovereign and sovereign is sovereign because it makes the law. The relation between the sovereign and law is the relation between the centre and the circumference.

Austin refers to *three exceptions* to his theory of positive law. Although those things are considered to be within the province of jurisprudence, they are not in the nature of commands. (1) There are the declaratory or explanatory laws which are passed merely to explain the law which is already in force. The General Clauses Act falls into this category. It merely defines certain terms of common use in the statutes. Likewise, Acts of interpretation also fall into this category. (2) Laws to repeal laws and to release persons from existing duties are laws although they are not in the nature of commands. These laws relieve certain persons from certain obligations. Reference may be made in this connection to the Excess Profits Tax (Repealing) Act which merely relieves people from their obligation to pay excess profits tax to the State. (3) Likewise, the imperfect laws or laws of imperfect obligations have no sanction behind them. It is left to the discretion of the individuals concerned to adopt them or not. Reference may be made in this connection to the Debt Relief Act which enables a debtor to get some relief if he chooses to do so. Subject to the above exceptions, the view of Austin was that all other laws were in the nature of general commands.

### Criticism

(1) Austin's conception of law as a command of the sovereign has been criticised by many writers. It is pointed out that *all laws cannot be expressed in terms of a command*. Many of them are of a permissive nature. To quote Keeton, "They say that if a certain course of conduct is pursued, the State will protect the action of the doer. Thus, if a man makes his will in conformity with the regulations of a statute, the State will give effect to his will; but there is no command by the State to individuals to make wills in the prescribed form. Further, there are statutes which repeal statutes; they permit things to be done which were previously forbidden. Here again the element of command is missing. It is sometimes argued that in such cases, the State commands the judges to permit certain things; but such an interpretation seems an unjustifiable straining of language and was assuredly not contemplated by Austin himself who admitted that the proposition that law is a command must be taken with limitations adding later that laws to explain laws could hardly be regarded as laws properly so-called, whilst laws to repeal laws are revocation of commands or permissions and as such constitute clear exceptions to his definition." According to Buckland, "The notion of law as a command and merely a command cannot be satisfactory to any one. That it is a command, the modern lawyer has to agree. The English lawyer cannot go behind it. He and the court are bound by an Act of Parliament. He may not even submit evidence outside the Act. What Parliament said is law, not what it may have meant. He cannot contend that the law is no longer binding as conditions have changed and the evil no longer exists or that Parliament has no business to make such a law. He cannot apply the strange doctrine, already considered, that a bad law is not a law at all. But he knows very well that the law is much more than a command. The command is not fortuitous; it has traceable causes behind it. It is the outcome of innumerable causes and conditions, currents of opinion and philosophies."

(2) It is pointed out that *law has not always been imposed upon the people by an outside authority*. Austin's definition of law may be true of a monarchical police state, but it cannot be applied to a modern democratic country whose machinery is employed for the service of the people. The sanction behind law is not the force of the State but the willingness of the people to obey the same. *To define law in terms of sanction is like defining health in terms of hospitals and diseases*. Force can be used only against a few rebels and not against the whole society. If a law is opposed by all the people, no force on earth can enforce the same.

(3) According to Austin, sanction is an essential element of law. However, if we apply this fact to every kind of law, we arrive at some foolish conclusions. It is true that there is such

a thing as sanction in the case of criminal law but no such sanction is to be found in the case of civil law. *If we accept Austin's definition, the whole of civil law will have to be excluded from the scope of positive law.*

(4) Austin's definition of law *cannot be applied to Hindu law, Mohammedan law and the Canon law.* These laws came into existence long before the state began to perform legislative functions. It might be contended by the supporters of the Austinian theory that "What the sovereign permits, he impliedly commands," but Parker rightly points out that what the sovereign can permit is merely their enforcement. The sovereign cannot create them. *It is too much to maintain that the personal laws of the Hindus and Muslims have been created by the command of a sovereign.*

(5) According to Salmond, Austin's definition of law refers to "a law" and not to "the law." The term "a law" is used in a concrete sense to denote a statute, *e. g.*, the law of contract, etc. However, the term "the law" is used in an abstract sense to denote legal principles in general. *Austin's definition refers to law only in the concrete sense and not in the abstract sense.* However, a good definition of law must deal with both aspects of the law.

(6) *Austin's definition of law cannot be applied to international law.* Although international law is not a command of any sovereign, yet it is considered to be law by all concerned. The view of Austin was that international law was positive morality. He described it as "law by analogy." Austin has been repudiated on this point.

(7) Austin's definition of law does not apply to *constitutional law* which cannot be called a command of any sovereign. As a matter of fact, it is the constitutional law of a country that defines the powers of the various organs of the State. Nobody can be said to command himself. Even if one makes a command to bind one's self, it cannot have much force. Constitutional law is regarded to be law by all concerned and if the definition of Austin does not apply, the definition must be taken to be defective.

(8) The advocates of historical jurisprudence point out that Austin's view of law is *inadequate and inaccurate.* In early times, the sovereign was not concerned with the making of laws. Customs and popular usages regulated the lives of the people and not any command of the sovereign. *Austin's definition applies only to modern times and not to early times.* According to Sir Henry Maine, "At first sight, there can be no more perfect embodiment than Ranjit Singh of sovereignty as conceived by Austin. But he never made a law. The rules which regulated the lives of his subjects were derived from their immemorial usages and

these rules were administered by domestic tribunals in families or village communities." According to another writer, Austin's definition of law as a command "has often been criticized on the ground that whilst it may be a satisfactory definition of nineteenth century English law based primarily on regulation by an omnipotent parliament, it is an entirely erroneous description of the law of an early society in which legal rules may be static for long periods and in which the binding force of the rules depends largely upon their notoriety and antiquity."

However, the reply of Salmond to the criticism of the historical school is that Austin's definition of law applies to a mature state and not to a backward state. To quote him, "If there are any rules prior to and independent of the State, they may greatly resemble law; they may be the primeval substitutes of law; they may be the historical source from which law is developed and proceeds; but they are not themselves law. There may have been a time in the far past when a man was not distinguishable from an anthropoid ape, but that is no reason for now defining a man in such wise as to include an ape. To trace two different things to a common origin in the beginning of their historical evolution is not to disprove the existence or the importance of an essential difference between them as they now stand. This is to confuse all boundary lines, to substitute the history of the past for the logic of the present and to render all distinction and definition vain." According to Holland, "With regard to Sir Henry Maine's example, it may be questioned whether Austin would have acknowledged Ranjit Singh as a true sovereign in the legal sense, since he was concerned directly neither with the promulgation nor with the enforcement of legal rules. Also, no doubt, he would have pointed out that the village communities under Ranjit Singh either followed their customs or they did not. If deviations were acquiesced by the domestic tribunals of Sikhs, the customs ceased to be law. If, as was actually the case, the domestic tribunals enforced the customs, they were supported in the last resort by the authority of Ranjit Singh himself who, therefore, might be regarded as adopting and commanding so much of the customary law as the domestic tribunals enforced."

(9) Austin put too much emphasis on *sanction* as an essential element of law. By sanction he meant the evil, or punishment which was given to the violators of law. To quote him, "When there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command and therefore imposes a duty." This view has been criticised by the writers of the historical, sociological and philosophical schools. They all reject the element of sanction in law. It is rightly pointed out that although international law and conventions are not backed by any authority, yet they are obeyed like any other law of the state. According to Miller, "The machinery of law



may include a sanction or artificial motive, but in all societies the laws imposed or recognised are enforced and obeyed without any artificial sanction because if men are to live, they must act in some way and in society it is generally found that the path of law is the path of least resistance." According to Paton, "It cannot be explained psychologically as to how laws are obeyed on account of the sanction. Sanction can be applied only if there are only a few to oppose the law. However, if every one decides to challenge law, it is bound to fail in its objective and no sanction can enforce the same." According to Pollock, "Law is enforced on account of its validity. It does not become valid merely because it is enforced by the state."

(10) Critics point out that Austin's theory of sovereignty ignores altogether the purpose of law and as such is one sided and incomplete. According to Paton, justice is the end of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'être*. According to Sir Henry Maine, Austin's theory is founded on "a mere artifice of speech and that it assumes courts of justice to act in a way and from motives of which they are quite unconscious." The use of medicine is the cure of a patient and likewise the use of law is to give justice to the people. Critics point out that the purpose of law should be included in the definition of law. One reply to the criticism is that although it is desirable to include the purpose of law in the definition of law, it is not absolutely essential. Moreover, to define law in terms of its purpose is like defining a horse as an animal which trots or pulls a vehicle or like defining a rupee as a piece of money used for buying commodities.

(11) Austin ignores the courts which enforce the laws in modern times. Laws are meant more as rules for the guidance of the courts in the administration of justice than as rules for the guidance of the people. Austin's definition is defective in so far as it does not put the proper emphasis on courts.

Austin completely ignores the ethical aspect of law. He declared that he was not bothered about the fact whether it was just or unjust, good or bad. Law was merely concerned with command and sanction. Whatever was law in the eyes of a lawyer was to be considered law even if its enforcement resulted in injustice and immorality. Too much emphasis on forms and not on the substance of law is bound to defeat the very purpose for which law exists.

According to John Chipman Gray, "The idea of the state is fundamental in jurisprudence; but having postulated the state, we can turn at once to see what are its organs, legislative, judicial and administrative, and to consider the rules in accordance with which they act...."

"The real rulers of a political society are undiscoverable. They are the persons who dominate over the wills of their fellows. In every political society we find the machinery of government, king or president, parliament or assembly, judge or chancellor. We have to postulate one ideal entity to which to attach this machinery, but why insist on interposing another entity, that of a sovereign? Nothing seems gained by it and to introduce it is to place at the threshold of jurisprudence a very difficult, a purely academic, and an irrelevant question."

According to Prof. Friedmann, "The characterisation of all law as command has been criticised from different quarters. Kelsen has condemned it as introducing an inadmissible psychological element into the pure norm of law. Bryce, Gray, Dicey and others have criticised the description of such legal relations as legal powers, rights, privileges as sovereign commands. These writers think that private rights, administrative acts, declaratory laws cannot be characterised as commands. In this matter, however, Austin is powerfully supported by the Vienna school, whose theory of concretisation of law (Stufen theories) considers that all kinds of legal acts, whether statutes, decrees, by-laws, contracts, administrative and judicial acts, represent different stages in the unfolding of the law and acquire the character of legal acts by the sanction of the ultimate law-giving authority." (P. 217, Legal Theory).

In spite of the criticism of Austin's theory of law, it cannot be denied that Austin rendered a great service in giving a clear and simple definition of law. Before his time, there was a lot of confusion about the nature of law. By separating law completely from morality, he tried to avoid a lot of confusion. His theory of law contains an important element of universal and paramount truth. The law is created and enforced by the State. According to Gray, "If Austin went too far in considering the law as always proceeding from the State, he conferred a great benefit on jurisprudence by bringing out clearly that law is at the mercy of the State."

### **Law and Morality**

Writers like Austin, Kelsen and others have tried to make a clear distinction between law and morality although the two are bound to be affected by each other. The whole of the life of man cannot be regulated by law alone and the same is true of morality. Law is concerned with the external actions of individuals and morality with their inner conscience.

According to Arndts, "There are four points of difference. (1) In law man is considered as a person, that is because he has a free will; in morals we have to do with determining the will towards the good; (2) Law considers man only in so far as he lives in community with others; morals give a guide to

lead him even if he were alone; (3) Law has to do with acts in so far as they operate externally; morals look to the intention—the inner determination and direction of the will; (4) Law governs the will so far as it may by external coercion; morals seek a free self-determination towards the good." According to Paton, "Morals or ethics is a study of the supreme good. Law lays down what is convenient for that time and place; Ethics concentrates on the individual rather than society; law is concerned with the social relationship of man rather than the individual excellence of their character; Ethics considers motive as all-important; law insists merely by conduct with certain standards and seldom worries for motive. But it is too narrow to say that ethics deals only with the individual or that ethics treats only of the interior and law only of the exterior, for ethics in judging acts must consider the consequences that flow from them. Moreover, ethical duties of man cannot be considered without considering his obligation to his fellows or his place in society."

According to Vinogradoff, "Law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of organised society while the tendency of morality is to subject the individual to the dictates of his own conscience." According to Pollock, "Though much ground is common to both, the subject-matter of law and ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules and is not included in it and the purposes for which they exist are different." According to Duguit, "Law has its basis in social conduct. Morals go on intrinsic value of conduct. Hence it is vain to talk about law and morals. The legal criterion is not an ethical criterion." According to Capitant, "Social organisation rests equally on law and morals. The precepts of both are obligatory; those of law are enforced by public authority; those of morals are addressed only to the individual conscience." According to Longo, "Ethics is the common foundation. Morals regard man with respect to his ultimate destiny; law regards him with respect to conditionally good in an external social relation." According to Korkunov, "The distinction between morals and law can be formulated very simply. Morality furnishes the criterion for the proper evaluation of our interests; law marks out the limits within which they ought to be confined."

According to Pound, "Law and morals have a common origin but they diverge in their development."

According to Bentham, "In a word, law has just the same centre as morals but it has by no means the same circumference." According to Paton, "Since law exists to harmonize the purposes of individuals, law itself strives towards justice." According to another writer, "Law does not aim at perfecting the indivi-

dual character of man ; but at regulating the relations of the citizens. The office of law does not extend to that which lies in the thought and conscience of the individual. The possible coincidence of law and morality are limited by the range of external morality. 'Thou shalt not steal' may be and is legal as well as moral, the commandment 'Thou shalt not covet' may be of greater importance as a moral preaching but it cannot be a legal one. In this case, the law of the legislator will be inoperative unless an external list of covetousness were assigned by a more or less arbitrary definition and then the real subject-matter of the law would be not the passion of covetousness but the behaviour defined as evincing it."

According to Pollock, it is true that much ground is common to both law and ethics, the subject-matter of the two is not the same. The field of legal rules of conduct does not coincide with that of moral rules and is not included in it. The purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men but at regulating the relations of citizens to the commonwealth and to one another. As human-beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual.

The possible coincidence of law with morality is limited by the range of that which theologians have named external morality. The commandment that "Thou shalt not steal" may be and in all civilised countries is both legal and moral. However, the commandment "Thou shalt not covet" may be of even greater importance as a moral precept but it cannot be a legal one. A legislature may make a law against covetousness but it would be inoperative unless an external test of covetousness were assigned by a more or less arbitrary definition. In that case, the real subject-matter of law would not be the passion of covetousness but the behaviour defined as evincing it. The judgment of law has to proceed upon what can be made manifest. Action and intent shown in acts and words, not the secret springs of conduct in desires and motives, are the normal materials in which courts of justice are versed. With rare exceptions, an act not otherwise unlawful in itself will not become an offence or legal wrong because it is done with a sinister motive. It will not be an excuse for an act contrary to the general law to show that the motive from which it proceeded was good. If the attempt is made to deal with rules of purely moral kind by judicial machinery, one of the two things will happen. Either the tribunal will be guided by mere isolated impressions of each case, and therefore will not administer justice at all or precedent and usage will be get settled rule and the tribunal will find itself administering a formal system of law which in time will be as technical and appeal as openly to an external standard as any other system.

## Law and Logic

The view of Sir Edward Coke was that the common law of England was the perfection of reason. A similar view was expressed by Aristotle when he stated that "Law is reason without passion." However, that is not always the case. Human life is not all logic and the legal system of a country may not be logical at all. To quote a writer, "In England, we have deep distrust of logical reasoning and it is well-founded. Our judge-made law has seldom deviated into that path. But on some of the rare occasions when it has done so, the results have been disastrous. Thus common law has proceeded empirically and gradually, testing the ground on each step and evincing an extreme reluctance to embrace any broad theoretical principles. In this manner, the English law and the British Constitution have arisen and developed. The lofty disregard for logical system is sometimes looked upon as an eminently Anglo-Saxon prerogative."

According to Justice Holmes, "The life of law has not been logic. It has been experience. The law will become consistent when it ceases to grow. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious; even the prejudices which judges share for their followmen have had a good deal more to do than the syllogism in determining the rules by which man should be governed. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become." Again, "Logic gives only the formal side. It will be an error to suppose that the science of law resides in the *elegantia-juris* or logical cohesion of part with part. The truth is that the law is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end and it always retains old one from history at the other. It will become entirely consistent only when it ceases to grow."

According to Wright, "In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons." According to Lord Halsbury, "A case is only an authority for what it decides. I entirely deny that it can be quoted for a proposition that may follow logically from it. It assumes that law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

## Purpose of Law

It is not possible to dogmatise regarding the purpose of law. The same has been changing from time to time and

country to country. Law is not static. It must change with changes in society. This explains as to why there is no unanimity with regard to the purpose of law.

(1) According to one school of thought, the object of law is to *maintain law and order* in the country. It has to perform police functions. According to Plato, "Mankind must either give themselves a law and regulate their lives by it or live no better than the wildest of the wild beasts." According to Hobbes, "Law was brought into the world for nothing else but to limit natural liberty of particular men in such a manner as they might not hurt, but assist one another and join together against a common enemy." Again, "Hereby it is manifest that during the time men lived without a common power to keep them all in awe, they are in that condition which is called wars and such a war as is of every man against every man..... Whatsoever, therefore, is consequent to a time of war, where every man is enemy to every man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such a condition, there is no place for industry...no arts, no letters, no society and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short." According to Locke, "Law, in its true notion, is not so much the limitation as the direction of a free and intelligent agent to his proper interest and prescribes no further than this for the general good of those under the law...so that, however, it may be mistaken, the end of law is not to abolish or restrain but to preserve or enlarge freedom." According to Jeremy Taylor, "A herd of wolves is quieter and more at one than so many men unless they all had one reason in them or have one power over them. There is, it seems, no one reason in men." According to Kant, "The aim of law is freedom and that the fundamental process of law is the adjustment of one's freedom to that of every other member of the community."

(2) The Hindu view regarding the purpose of law was that it should aim at the *welfare of the people* in this world and also their salvation after death. According to Dr. P. N. Sen, "The province of law is the establishment of rules for the regulation of human conduct amidst diversities of inclinations and desires so as to reconcile and harmonise the wishes of the individual with the interest of the community in which ultimately the interest of the individual is also involved; it curtails the fictitious freedom of un-regulated desires by subordinating the particular nature of individual man to the discipline of the community acting upon universal rational principles and thereby gradually tends to bring about the higher freedom which consists in dependence of the individual on the dictates of reason which, while governing the community, is also his. It may be that this conception of the aim of law is not consciously recognised at the outset, but there

can hardly be any doubt that the various systems of law exhibit, on a careful analysis, so many efforts made towards the realisation of the end indicated above at different stages of development. In so far as the conditions of different societies and the stages through which they have passed are not exactly similar, the systems of law which they have severally evolved are more or less dissimilar to one another: yet the unity of human constitution and the universality of human reason concur in producing an essential similarity in all the systems which exhibits itself to a scientific observer amidst the diversity of details."

(3) According to the Mohammedan Law, the purpose of law is the *discipline of the soul, the improvement of morals and the preservation of life, property and reputation*. To quote Sir Abdur Rahim, "The end of law is to promote the welfare of man both individually and socially, not merely in respect of life on this earth but also of future life. The sanctions of Mohammedan Law were wider than those of any modern law since it had the two-fold object of spiritual benefit and social good. Its policy was to encourage obedience by offer of reward and to discourage disobedience by imposition of penalty awardable either in this world or in the next or in both."

(4) According to Gilbert, "Law is the embodiment of everything that is excellent." According to Stammler, "the object of law is to give every individual adequate means of *self-expression*." Again, "All positive law is an attempt at just law." According to Justice Holmes, "The object of law is not the punishment of sins but to prevent certain external results." According to Bentham, "Of the substantive branch of the law, the only defensible object or end in view is the maximisation of the happiness of the greatest number of the members of the community in question." According to Holland, "Law is something more than police. Its ultimate object is no doubt nothing else than the highest well-being of society and the state from which law derives all its force is something more than an 'institution for the protection of rights,' as it has not aptly been described." Again, "A school of writers among whom Krause and Ahrens are representative men, demands that law shall be conceived of as harmonising the conditions under which the human race accomplishes its destiny by realising the higher good of which it is capable. The pursuit of this highest good of the individual and of society needs a controlling power which is law and an organisation for the application of its control which is the state."

(5) According to *Pound*, there are four purposes of law. In the first place, the purpose of law is to maintain law and order within a given society and has to be done at any cost. There was too much of emphasis on this aspect of law in primitive society as the problem of security was all-important.

Secondly, the purpose of law is to maintain the *status quo* in society. To quote Pound, "As Plato puts it, the shoe-maker is only to be a shoe-maker and not a pilot, also the farmer is to be only a farmer and not a judge as well; the soldier is to be only a soldier and not a man of business besides; and if a universal genius who through wisdom can be everything and do everything comes to the ideal city State, he is to be required to move on. Aristotle puts the same idea in another way asserting that justice is a condition in which each keeps within his appointed sphere."

In the third place, the purpose of law is to enable individuals to have the maximum of freedom to assert themselves. Such a view prevailed during the 17th, 18th, and 19th centuries. The object of law is to enable the people to have natural liberty.

Fourthly, the purpose of law is the maximum satisfaction of the needs of the people. The function of law is to satisfy the needs of people living in society.

Allen makes the following observation with regard to Pound's view about the purpose of law: "Prof. Pound's legal philosophy is essentially one of practical compromise. He believes, with Ihering, that the 'interests' are the chief subject-matter of law and that the task of law in society is the satisfaction of human wants and desires. There are ever changing as 'all things flow' and in the pursuit of its high purpose of social control, law is faced with two perpetual problems; first, the maintenance of a balance between stability and change, and second, the ascertainment of those social desiderata which it is both possible and desirable for the law to satisfy."

### Suggested Readings

Austin	: Jurisprudence.
Brown	: The Austinian Theory of Law.
Buckland	: Some Reflections on Jurisprudence.
Compbell	: Austin's Jurisprudence.
Eastwood and Keeton	: The Austinian Theories of law and Sovereignty.
Jennings (Ed)	: Modern Theories of Law.
Lightwood	: Nature of Positive Law.
Vecchio, Del	: Formal Bases of Law.



## CHAPTER III

### KINDS OF LAW

Sir John Salmond refers to eight kinds of laws and those are imperative law, physical or scientific law, natural or moral law, conventional law, customary law, practical or technical law, international law and civil law.

#### (1) Imperative law

According to Salmond, "Imperative law means a rule which prescribes a general course of action imposed by some authority which enforces it by superior power either by physical force or any other form of compulsion." The chief advocate of imperative law is Austin. According to him, "A law is a command which obliges a person or persons to a course of conduct."

Salmond refers to two essential characteristics of imperative law. (a) The first is that the *command* of the sovereign must be in the form of a general rule. It must not be a particular command addressed to a particular individual and not others. Law must be general or it is not law at all. However, it is pointed out by critics that complete generality is neither possible nor desirable. Sometimes, a law is applicable only to a particular class and not to the whole population. Moreover, the class may be limited to a single possible person and to a particular occasion. In spite of this, it cannot be denied that law must not make any distinction among people and should apply to all of them and not to some of them alone.

(b) The second characteristic of imperative law is that it should be *enforced* by some authority. The observance of the law must not depend upon the pleasure of the people. If that is so, it is not law at all. Law is to be enforced by the machinery of the State. To quote Hobbes : "It is men and arms that make the force and power of the laws." The source of law is not consent, custom or reason but the strength of the State. The instrument of coercion by which law is enforced is called sanction. Sometimes, the sanction is in the form of censure, ridicule or contempt and sometimes it is in the form of physical force. The sanction is not necessarily a punishment.

Imperative laws are of *two kinds*. One kind of imperative law is issued by the State and enforced through its courts and is called *positive law*. Examples of such law are civil law, military law, revenue law and administrative law. The second kind of imperative law is issued by other superior authorities and enforced by the sanction of an adverse public opinion. This is given the name of *positive morality* by Austin. According to the latter, positive morality means any rule of conduct prescribed by persons other

than political superiors. It follows from above that rules of conduct set by political superiors are positive law and rules of conduct set by any other superior are positive morality. It is not necessary that positive morality must accord with natural morality. The institution of Sutte in India was sanctioned by the public opinion of the country and was a part of positive morality but it was opposed to all notions of natural morality.

**Divine Law** is imperative law. It is laid down by a superior authority in the form of God. It is followed compulsorily and its breach is a sin which is punishable by the anger of God. *International law* is a form of imperative law. Its rules are laid down by the civilized states. These rules are followed compulsorily and their breach is visited by punishment. There may be war, the cutting off of diplomatic relations, enforcement of economic sanctions, condemnation by other States, etc. In the case of *Civil law*, the superior power is the sovereign and *compulsion* is the fear of punishment by the State. Civil law is enforced by the might of the State. In the case of *positive morality*, the superior authority is the society. The compulsion lies in the fear of public censure, ridicule or contempt.

## (2) Physical or Scientific Law

According to Salmond, "Physical laws or the laws of science are expressions of the uniformities of nature—general principles expressing the regularity and harmony observable in the activities and operations of the universe." In this connection, we may refer to the law of tides, etc. Physical laws are also called natural laws or laws of nature. There is uniformity and regularity in the physical laws. They are in absolute and unchanged operations throughout the world. Those laws are not creation of man and they cannot be changed by him. Human laws change from time to time and country to country but the physical laws are invariable and immutable for ever. According to Hooker, "His commanding those things to be which are and to be in such sort as they are, to keep that tenure and course which they do, importeth the establishment of nature's law. Since the time that God did first proclaim the edicts of his law upon it, heaven and earth have hearkened unto his voice and their labour hath been to do his will. See we not plainly that the obedience of creatures unto the law of nature is the stay of the whole world." Again, "Of law, there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage."

## (3) Natural or Moral Law

According to Salmond, "By natural or moral law is meant the principles of natural right and wrong—the principles of natural justice, if we use the term justice in its widest sense to include all forms of rightful action." Natural law has been called the divine

law, the law of reason, the unwritten law, the universal or common law and the eternal law. It is called the command of God imposed upon men. It is established by that reason by which the world is governed. It is not written on brazen tablets or pillars of stones but by the finger of nature in the hearts of men. It is universally obeyed in all places and by all peoples. It has existed from the beginning of the world and hence is eternal.

Divine law is also called natural law as its principles are supposed to have been laid down by God for the guidance of mankind. It is called rational law as it is supposed to be based upon reason. It is called unwritten law as it is not to be found in the form of a code. It is called universal law or common law as it applies to all the States and all the people. All these names are not considered to be satisfactory. However, they point out the various characteristics of natural law. Thus, natural law appeals to the reason of man. It is addressed to intelligent human-beings. It does not possess physical compulsion. It is eternal and embodies the principles of morality. Its principles are common to all the States. Natural law exists only in an ideal state and thus differs from positive law of a State.

From time to time, great writers have expressed their views on natural law or the law of the nature. According to Aristotle, "Law is either universal or special. Special law consists of the written enactments by which men are governed. The universal law consists of those unwritten rules which are recognized among all men." Again, "Right and wrong have been defined by reference to two kinds of law. Special law is that which is established by each people for itself. The universal law is that which is conformable merely to nature." According to Cicero, "There is indeed a true law, right reason, agreeing with nature, infused among all men unchanging, everlasting. It is not allowable to alter this law nor to derogate from it nor can it be repealed. We cannot be released from this law, either by the praetor or by the people, nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law today and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common lord and ruler of all, even God the framer and proposer of this law." According to Justinian, "Natural law which is observed equally in all nations, being established by divine providence, remains for ever settled and immutable; but that law which each State has established for itself is often changed, either by legislation or by the tacit consent of the people." According to Hooker, "The law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all for ever bound unto in their actions." According to Gaius, "All peoples that are ruled by law and customs observe partly law peculiar to themselves and partly law common to all mankind. That which any people has established for itself is called *jus civile*, as being law peculiar to that

State. But that law which natural reason establishes among all mankind is observed equally by all peoples, and is for that reason called *jus gentium*." According to Christian Thomasius, "Natural law is a divine law written in the heart of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind and to refrain from those things which are repugnant to it."

According to Hobbes, "The law of nature is the dictate of right reason, conversant about those things which are either to be done or omitted for the constant preservation of life and members as much as in us lies." Again, "A law of nature is a general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life and takes away the means of preserving the same and to omit that by which he thinks it may be best preserved."

According to Gierke, "Man also taught that the highest power on earth was subject to the rules of natural law. They stood above the Pope and above the Kaiser, above the ruler and above the sovereign people, nay, above the whole community of mortals. Neither statute nor act of government, neither resolution of the people nor custom, could break the bounds that thus were set. Whatever contradicted the eternal and immutable principles of natural law was utterly void and would bind no one."

Grotius, the father of international law, based the principles of international law on the law of nature. According to him, human nature was the grand-mother, natural law was the parent and positive law was the child.

To quote Grotius: "The law of nature is a dictate of right reason which points out that an act according as it is or is not in conformity with the social and rational nature of man has in it a quality of moral baseness or moral necessity, and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."

According to Pufendorf, "Thus when we assert that the law of nature is founded on the principles of right reason we mean by that that human understanding is imbued with such a faculty as by reflecting on the nature and constitution of mankind to discover clearly and distinctly the necessity of living conformably to the law of nature; as likewise to find out some fundamental principles by which the precepts of it may solidly and convincingly be demonstrated."

According to Blackstone, "This law of nature, being as ever with mankind and dictated by God himself is of course superior to any other; it is binding over all the globe in all countries; no human laws are of any validity if contrary to this and such of them as are valid derive all their force and all their validity mediately and immediately from this original law."

*Regarding the importance of the law of nature, Bodenheimer remarks thus: "No clear philosophy moulded and shaped American thinking and American institutions to such an extent as did the philosophy of natural law in the form given to it in the seventeenth and eighteenth centuries." According to Friedmann, "The history of natural law is a tale of the search of mankind for absolute justice and its failure."*

According to Dr. Julius Stone, "Natural law thinking became dominant in the modern world at a time when the authoritarianism of medieval Church and Empire were already crumbling. The Reformation in its destructive aspects was already doing its work, and the free inquiry which we associate with the Renaissance had produced a powerful intellectual ferment. In the sphere of law this ferment manifested itself mainly in the thought and work of the natural lawyers. They were as much children of the Renaissance as was Francis Bacon; and they stand in the comparable relation to modern juristic theory, to that which Bacon occupies in relation to scientific theory. As he built his Utopias of science, they built their Utopias of law and society; as he mingled the fancies and prejudices of his age with insights into the discoveries of the future, so did they.

"Moreover, the natural law theory of justice is important for its recurring influence over the whole modern period, and it is also important because of its stimulus to opponents. Reaction to natural law has been a most powerful stimulant to the formulation of other theories.

"Natural law thinking in whatever age and under whatever form is essentially an assertion of faith in a standard of values. It is an 'assertion of faith' rather than a demonstration. Its dialectical weapons are 'right reason; nature, with its appendages, rational nature, state of nature, conformity with nature, sociability and the like; the consensus of all mankind, or of some essential part of mankind; the divine will'. The effectiveness of these weapons depends upon the existence of a sufficient number of persons who for one reason or another feel driven to assert the same faith or to accept the assertion made by the intellectual and moral leaders of the time.

"It is this central characteristic of natural law thinking which makes difficult a full appreciation of it, and makes easy the ridicule of it in a later age. 'All this twisting and turning,' wrote Pareto after an analysis of the writings of some of the classical natural lawyers, 'amounts in the end to saying that 'natural law' is a phrase that arouses in the mind of the author an atmosphere similar to the atmosphere aroused by the words 'rational nature', 'conservation', 'perfection', 'good and advantageous state' . . . Why, then, instead of going so far afield, does not the author say it that way and have done with it.' Once, in short, the spell of a common intuition

is broken, the standard appears suspended in mid-air devoid of any apparent basis in reality". (P. 234-35).

Again, "Natural law, wherever it has been an effective ideological force in political or legal development will always be found to have had deep roots in the conditions of the time. This was true of the profound influence of natural law upon the law of ancient Rome. It was also true of the influence of natural law in seventeenth and eighteenth century Europe. And it was true of the natural law theories which deeply affected constitutional interpretation in the United States in the nineteenth century. It is the central quality of natural law thinking that it seeks to give to insights relevant for a time and a place a quality of absolutism and universality. No one perhaps, with the exception of Bentham, has lashed more bitterly than Pareto, the non-logical character of natural law demonstrations. But it is Pareto who has stated most clearly the vital importance of natural law thought, despite of this character. 'But if we disregard forms and consider what it is they hide, we discover inclinations and sentiments that exert a powerful influence in determining the constitution of society and therefore are worthy of the closest study. . . . (we must not) stop with the reflection that a certain argument is inconclusive, idiotic, absurd, but ask ourselves whether it may not be expressing sentiments beneficial to society, and expressing them in a manner calculated to persuade many people who would be at all influenced by the soundest logico-experimental argument'." (P. 236, *The Province and Function of Law*).

According to Lord Radcliffe, "I imagine that every lawyer in his heart sighs for some doctrine of Natural Law to bring to bear upon the raw material of his labors. It is his escape route from the sharply delimited areas of legislative enactment and established precedent. It is more than that: it is his link with a more universal conception of justice than his own municipal system is likely to seem to embrace. There is another reason. A system of law, particularly perhaps one with a long history of continuous development, needs a standard of reference outside itself by which to assess and reassess its own results. Such a standard of reference would be supplied by Natural Law if only, under the conditions of contemporary society, there could be found viable means of bringing the conceptions of Natural Law to bear upon the administration of justice. The real difficulty for English law—I speak of no other system—is to make use of the concept in a practical way under whatever name you like to propose it—a new equity, justice, the Law of Reason, or anything else.

"It is familiar learning that the idea of a Law of Nature transcending in obligation any man-made law has been accepted in a great many parts of the world in a great many stages of civilization. Not only ancient and medieval

Europe subscribed to it: it is possible, I understand, to find a similar conception dominant in the basic philosophies of India and China and in the teaching of Islam. And so one would expect. *Man would not be the creature that we know if he did not at his gravest and best assert that in the end all law must range itself in relation to the moral law. My concern is not to doubt this. It is for the moment with the more practical question how such a governing idea is to be given reality in the sort of society which we have now developed, and how the positive law that we administer can be seen to observe and honor the connection. For if it is not seen to do so, if it cannot dramatize its belief in some striking way that commands the attention of society, it will be in danger of forfeiting in course of time that deep sense of respect which the mere habit of obeying the law needs as its fortification.*

"It was not a mere accident that the only ordered attempt to introduce the Law of Nature into the English judicial system belonged to the eighteenth century. Despite the break-up of the medieval world, with its grand belief in the supranational polity of Christendom and a single unifying set of religious and legal principles, men still thought it incumbent upon them to look for a jurisprudence that could claim some higher title than that of being an expression of the national will. They had not yet made a deity of that metaphysical conception. Indeed, the writing and thinking of the day accepted with a strange credulity the idea of a universal Law of Reason to which human institutions were subjected and by which they could be judged. The teaching of the medievalists may have been itself neglected (men are keen enough today to study the thought of Aquinas): but the new men who spoke for the world of Reformation, Counter-Reformation, and post-Reformation still used the same universal language—Grotius, who held that natural law would hold dominion even if God did not exist, Suarez, Bellarmine, Hooker, Hobbes, even Locke, despite the new twist that he gave to the requirements of the Law of Nature.

"Lord Mansfield, therefore, our great expositor of 'Reason' and the 'Law of Nature', found a situation that was happily suited to his experiment. The learning of the common law was not congested with reports of decided cases, as it is today, so that he might hope, though in the end his hopes were frustrated, to escape being borne down by precedent. On the other hand, the prevailing theory of the function of Parliament, that it should interfere as little as possible with the existing law of private rights, disqualified anyone from supposing that the Lords and Commons were the appropriate source for needed emendations of the law. Mansfield, too, was that rare thing, a very learned lawyer who stood rather outside the law. He had been for years the prop of a political party: and he loved to 'drink champagne with the wits,' an

endearing characteristic which is more often associated with great advocates than great judges.

*"Even so, with all his advantages, Lord Mansfield failed to give any new and lasting orientation to English law. He succeeded as an immediate legal reformer in that in the name of Reason he introduced into the body of law much that had not been there before : conspicuously, the action for 'money had and received,' under which a defendant is obliged to refund money owing by the 'ties of natural justice and equity,' and the virtual remaking of the law merchant. But he failed in what I take to have been his wider purpose, to incorporate the Law of Nature in the municipal law as a permanent and pervading equity to which other principles of law should be subjected. What defeated him was the sanctity of the common law, or rather a combination of facts connected with the common law system. It was already by his time an old and articulated institution. It enjoyed great prestige as the supposed source and guarantee of the ancient civil rights in whose name Parliament was thought to have defeated Charles I and the makers of the Glorious Revolution James II. Lastly, at first sight, a system of precedent looks a great deal more like law than the more uncertain judicial reasoning of one or two living judges. This was the sting of the attack Julius launched on Mansfield. 'The Court of King's Bench becomes a court of equity and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the Court and the purity of his Conscience'. Dead men make the soundest law."* (Pp. 24-28, *The Law and its Compass*).

Again, "We must never, then, lose touch with the idea of Natural Law or give up the belief that all positive law bears some relation to it. Men will not let us, even if we want to. It is an idea too deep in human experience for a few generations to have outgrown it, and at that under political conditions that may prove to have been exceptionally favourable to the liberal experiment. But we try to make at once too much and too little of Natural Law if we treat it as being in any special sense the concern of lawyers or as an instrument peculiarly adapted to the work of jurists or of judges. It is not that, probably it never was that : and it is just this misconception of its true significance that has brought so much criticism upon the idea and has led critics to speak of it as something of only antiquarian interest, a cloudy vision of earlier times, a thing of no practical importance to affairs of our present day.

"Indeed, I do not doubt that Natural Law has suffered from this belief that it could somehow be equated with a code of fixed and positive injunctions. It was natural enough in the Middle Ages, when learned men themselves had so few points of reference in comparison with those open to us, that the Law of Nature should be spoken of as if it were all contained in the words of Holy Scripture or of the *Corpus Juris Civilis*. Yet even then it



was not claimed that these, though the surest, were the only sources from which the conceptions of Natural Law were to be derived. Such law was the driving equity, the imperative reason, which found its echo in all men's hearts : its dictates were to be learned in study of the best that the troubled history of civilization had preserved out of all that had been taught and written in its making. We, to whose eyes so much more of the world has been exposed, can look for no greater certainty in our results and can be sure only that we must struggle vastly harder with the vastly richer sources of our material.

"We may take it, I think, that in our developed system of municipal law—I am not speaking of international law, which raises a different set of problems—Natural Law is not likely to be more than a minor formative influence upon the work of the judge. The ground is too fully occupied for him to have much freedom in which to move. If can help—to an interpretation here, to a new line of approach there—but we should be talking theory, not speaking of fact, if we thought that judges in our society could remake the body of the law they administer into what they may approve as a shape of greater justice. But the principle of Natural Law was never intended primarily for lawyers. It was the product of the moralist, the theologian, and the philosopher, and their teachings were aimed at everyone, not at any special class or calling. They spoke to the lawyer, certainly, but even more directly to the prince or legislator, individual or assembly: they spoke to the Pope and Emperor as well as to the priest or magistrate : and what might matter most in the end, they spoke to the heart of each individual man. We are all implicated, if we accept the principle of Natural Law at all. We are all committed.

"To what then are we committed ? We are asked to believe that man is by nature a rational and social being. We are asked to believe that the growth of each individual towards responsibility and the freedom to choose the best that he can discern is a purpose which must never be conditioned by or made subservient to other purposes. We are asked to believe that there is at all times and in all ways an ideal fitness of things which corresponds to these beliefs and that by ourselves and working with others we are bound to do what we can to see that this fitness prevails in human affairs." (Pp. 93-95, *Ibid*).

The law of nature has performed a very useful function. It was with the help of the law of nature that the *Jus Civile* or civil law of the Romans was transformed into *Jus gentium* which later on became the basis of international law. Grotius based his principles of international law on the law of nature. An appeal was made to the law of nature to put a check on the arbitrary powers of the government and thereby to protect the liberties of the people. Judges also refer to the law of nature while interpreting the

*constitution. This has been done in the U. S. A. and the same is being done in India. The law of nature also puts forward an ideal to be followed. This was actually done by writers like Hegel, Kant, Paine, Aristotle, Locke, Hume, etc. During the Middle Ages, the law of nature was considered to be a higher law which was imposed on the people by the command of God. The law of nature sets up an ideal which the legal systems of the countries tried to achieve.*

According to Dias and Hughes, some of the contributions of the philosophy of natural law to human progress are epoch-making. In the first place, the various doctrines have always served the social need of the age. They have helped to maintain stability against change as in the time of the Greeks and medieval church. They have inspired change against stability, notably after the Reformation and the Renaissance. Secondly, the philosophy of natural law has inspired legislation and the use of reasons in formulating systems of law, a feeling which was strong at the time of the French Revolution. In the third place, the period from the Renaissance down to the 18th century witnessed a lasting distinction drawn between positive law and morality. Fourthly, the same period also brought about the emancipation of the individual. In the fifth place, a strong connection was established between positive law and the freedom of the individual. Sixthly, the natural rights of the individual acquired great significance. In the United States, they are enshrined in the Constitution. It is not always possible to justify arguments that have been founded on the doctrine of natural rights. Thus, slavery was justified on the ground that the right of property was a natural right and as slave was property and therefore slavery was a natural right and unalterable. Likewise, liberty in the 14th amendment of the American Constitution has been held to include unlimited freedom of contract and "person" has come to cover corporations. The result is that big corporations have been able to protect themselves behind the cover of the natural rights of the individual.

The influence of natural law ideas on English lawyers was also great. One of the effects was the doctrine of the supremacy of law. Natural law theories are reflected in the writings of certain legal authors such as Fortesque, Blackstone and St. German. The modern law of quasi contract was erected from avowed principles of natural justice. The conflict of laws was originally founded on natural justice. In cases of first impression, a judge must resort to his reason and sense of justice. The sense of justice of the judge plays a decisive part even when he is applying certain principles. It is all the more prominent where there are no principles to apply. The concept of reasonableness, particularly in tort, is the result of the ideas of natural law. The judicial control of administrative and quasi-judicial functions is based on the principle that those who administer them must abide by the

principles of natural justice. Foreign law is not applied in English courts if it is found contrary to the principles of justice. Occasionally, cases also reflect natural justice. In the case of *Sharlington v. Strotton*, the argument was drawn from natural law as to the purpose of marriage. In the case of *Calvin*, we find the statement, "first, that the ligeance or faith of the subject is due unto the King by the law of nature : secondly, that the law of nature is part of the Law of England : thirdly, that the law of nature was before any judicial or municipal law : fourthly, that the law of nature is immutable." In the case of *Somerset*, Lord Mansfield accepted the contention that slavery was an institution so odious to natural law that the English courts could not countenance it. The *Law Merchant* was conceived of as being based on principles of natural law which may have had something to do with its adoption in the time of Lord Mansfield. In certain overseas territories, until a system of law was officially introduced, natural law was resorted to in the administration of justice.

### Natural Law and Jus Gentium

Reference may be made to the relation between natural law and *Jus Gentium*. The Greeks identified natural law with an ideal moral code. According to the Stoics, there once existed a body of laws which was perfect in every way and also universal in its application. As human laws were made by men, they could not be perfect.

The Romans were influenced by the Stoic view of natural law. So far as the Roman citizens were concerned, they were ruled by the Roman civil law but the non-Roman aliens were governed by a law different from the civil law of the Romans. That law came to be known as the *Jus Gentium*. It was based upon principles of natural justice, reason, etc. *Jus Gentium* was administered by a separate Praetor known as the Praetor Peregrinus as distinguished from the Praetor Urbanus who administered the civil law of Rome.

To begin with, *Jus Gentium* was considered to be something inferior to civil law of the Romans as the aliens were considered to be inferior in status to the citizens of Rome. However, in course of time, *Jus Gentium* came to occupy a very important position as new principles of natural justice were incorporated into it on account of its flexibility. In the time of Cicero, *Jus Gentium* and natural law were identified.

After the fall of the Roman Empire, the term 'natural law' was given a different meaning. It was later on separated from religion and came to be considered as secular in character. The principles of natural law were used by writers like Grotius as basis for international law. Rousseau also made use of the idea of natural law in his philosophy while emphasising the equality of all men. The idea of natural law also played an important part

in the growth of English law up to the 18th century, but later on it was thrown into the background. Writers like Austin, Blackstone and Bentham put more emphasis on the laws promulgated by the state than on the rules of natural law. The conception of law as propounded by the analytical school, was clear and definite and there was no ambiguity about it as was the case with natural law. There was no unanimity among the writers regarding its contents.

However, there is a *widespread revival of the conception of natural law* in the world and there are many reasons for the same. There is a general desire to restore closer relations between law and morality. People are not satisfied with the Austinian view of law which ignores morality altogether. It is also felt that there is a necessity for a juristic basis for a progressive interpretation of positive law. The development of sociological theories and science demands that the theory of law should allow a judicial interpretation of positive law in accordance with changing ideas and circumstances. The development of the idea of relativity in modern law has removed the chief difficulty in the way of the old idea of natural law. Laws can be universal but they vary in their contents. No law is eternal and every law must change according to circumstances. There is evolution everywhere. According to Kohler, law is based on reason and the actual law at any time in any country depends upon the stage of the development of the people concerned.

#### (4) **Conventional Law**

According to Salmond, conventional law means "any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other." Conventional law is law for the parties who subscribe to it. Examples of such law are the laws of cricket or any other game, rules and regulations of a club or any other voluntary society, etc. Conventional law is based on the agreement of the parties concerned. The players agree among themselves to observe certain rules of the game and they abide by the same. According to some writers, *International law or the law of nations is also a kind of conventional law on the ground that its principles are expressly or impliedly agreed upon by the states concerned.*

#### (5) **Customary Law**

According to Salmond, Customary law means "any rule of action which is actually observed by men—any rule which is the expression of some actual uniformity of some voluntary action." A custom may be voluntary and still it is law. When a custom is firmly established, it is enforced by the authority of the state. Customary law is an important source of law. This is particularly so among the conservative people who want to keep as much of the past as possible.

## **(6) Practical or Technical Law**

Practical or technical law consists of rules for the attainment of some practical end. These rules guide us as to what we ought to do in order to attain a certain end. Reference may be made in this connection to the laws of music, laws of architecture, laws of style, etc.

## **(7) International Law**

International law or the law of nations consists of those rules which govern sovereign States in their relations and conduct towards one another. Many definitions of international law have been given by different writers. According to Oppenheim, "International law is the name for the body of customary and conventional rules which are considered legally binding (as distinguished from usage, morality and rules of so-called international comity) by civilized States in their intercourse with each other." According to Starke, "International law may be defined, for its great part, of the principles and rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also (a) the rules of law relating to functioning of international institutions and organizations, their relations with each other and their relations with States and individuals and (b) certain rules of law relating to individuals so far as the rights or duties of such individuals are the concern of the international community." According to Hyde, "International law may be defined as that body of law which is composed of the principles and rules of conduct which States feel themselves bound to observe and therefore do commonly observe in their relations with each other." According to Lawrence, international law consists of "the rules which determine the conduct of the general body of civilized States in their mutual dealings." According to Hughes, "International law is the body of principles and rules which civilized States consider as binding upon them in their mutual relations. It rests upon the consent of sovereign States." According to Hall, "International law consists in certain rules of conduct which modern civilized States regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious persons to obey the laws of the country and which they also regard as being enforceable by appropriate means in case of infringement." According to Fenwick, "International law may be defined in broad terms as the body of general principles and specific rules which are binding upon the members of the international communities in their mutual relations." According to Calvo, by international law "should be understood the sum of the rules of conduct observed by the various nations in their relations with one another; in other words, the sum of the mutual obligations of the States, that is to say, the duties which they must perform and the rights which they must defend with respect to one another."

According to Lord Russell of Killowen, international law is "the aggregate of the rules to which the nations have agreed to conform in their conduct towards one another." According to Coleridge, "The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another." According to Lord Cockburn, "To be binding the law must have received the assent of the nations who are to be bound by it. This assent may be expressed, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage." According to Lord Esher, "The authorities seem to me to make it clear that the consent of nations is requisite to make any proposition a part of the law of nations."

### Its Nature

There are certain writers who do not agree to use the term law in relation to international law. According to Holland, international law is the vanishing point of jurisprudence. Such rules as are voluntarily, though habitually, observed by every State in its dealings with the rest, can be called law only by courtesy. According to Lord Salisbury, international law "can be enforced by no tribunal and therefore to apply to it the phrase law, is to some extent misleading." According to Coleridge, "Strictly speaking, international law is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a law-giver and a tribunal capable of enforcing it and coercing its transgressor, but there is no common law-giver to sovereign States and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of States are but evidence of the agreement of nations and do not, in England at least, *per se* bind the tribunals." Austin refers to international law as positive international morality.

However, it is pointed out that international law is law in the same sense as any other law. If municipal law regulates the relations of one individual with another, international law regulates the relations of one State with another. The ultimate sanction behind ordinary law is the public opinion and it can also be maintained that the sanction behind international law is the world public opinion. International law is growing as a result of the judgements of the International Court of Justice. The General Assembly of the United Nations may be called the legislature of international law. As law is ordinarily obeyed by people on account of its utility, likewise international law is obeyed by nations on account of its usefulness. International law is recognized as law by the people. To quote Sir Frederick Pollock, "If international law were only a kind of morality, the framers of State papers concerning State policy would throw all their

strength on moral arguments. But, as a matter of fact, this is not what they do. They appeal not to the general feelings of moral rightness, but to precedents, to treaties and to opinions of specialists. They assume the existence among statesmen and publicists of a series of legal as distinct from moral obligations in the affairs of nations. In certain cases, it is expressly provided in the provisions of their municipal law that international law has a binding force. The constitution of the U. S. A. provides that the treaties are the supreme law of the land. According to Gray, "International law is a part of our law and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." According to Blackstone, "The law of nations, whenever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law and it is held to be a part of the law of the land." According to Lord Alverston, "Whatever had received the common consent of civilized nations must be taken to have received the assent of England; and that the rules which had been so assented to might properly be called international law and would in that character be acknowledged and applied by English municipal tribunals when occasion arose for them to decide questions to which international law might be relevant. The prize courts in England do not only recognize international law as a definite category of law but apply it in their decisions although these courts are set up by the law of the country." According to Oppenheim, international law is law in the true sense of the term. For hundreds of years, more and more rules have grown up for the conduct of the States with one another. These rules are to a great extent customary rules but along with them are daily created more and more written rules by international agreements.

However, Oppenheim admits that "there is at present no central government above the governments of several states which could in every case secure the enforcement of the rules of international law. For this reason, compared with municipal laws and the means available for its enforcement, the law of nations is certainly weaker of the two. A law is the stronger, the more guarantees are given that it can and will be enforced." According to Starke, "International law is weak law. It is mainly customary. Existing international legislative machinery is not comparable in efficiency to state legislative machinery. In spite of the achievements of the United Nations in re-establishing a world court under the name of the International Court of Justice, there still is no universal compulsory jurisdiction for settling legal disputes between States. Finally, many of the rules of international law can only be formulated with difficulty and, to say the least, are quite uncertain. It was on this account that the attempt of the International Conference of 1930 at The Hague to codify certain branches of international law, suffered a relative break-down."

Reference may be made to some other views regarding the nature of international law. It is considered to be a branch of natural law which embodies the principles of natural law. It is also a form of imperative law as its rules are obeyed and enforced under compulsion. It is a sort of conventional law as it is based on the consent of the States. This is held that international law has grown through the course of the last few centuries. According to Salmond, international law is greatly conventional law but not completely so. The customs which were observed by one set of states in their dealings were also accepted by others and thus they came to be embodied into international law. It is also a sort of customary law for the same reasons. According to another writer, international law is "a body of customs and observances in an imperfectly organised society which have not fully acquired the character of law but which are on the way to become law."

### (8) Civil Law

According to Salmond, civil law is "the law of the State or of the land, the law of lawyers and the law courts". The term civil law, means the law of a particular State. It is derived from the *jus civile* or civil law of the Romans. The term 'civil law' is not so very popular as it used to be. The term 'positive law' has become more popular than 'civil law'. Sometimes the term 'municipal law' is used in place of 'civil law'.

Holland prefers to use the term positive law and remarks thus: "A law in the sense in which that term is employed in jurisprudence, is enforced by a sovereign political authority. It is thus distinguished not only from all rules which, like the principles of morality and the so-called laws of honour and of fashion are enforced by an indeterminate authority, but also from all rules enforced by a determinate authority which is either, on the one hand, superhuman or on the other hand, politically subordinate. In order to emphasize the fact that laws, in the strict sense of the term, are thus authoritatively imposed, they are described as positive laws." However, Salmond prefers to use the term civil law instead of positive law and observes thus: "The term civil law, as indicating the law of the land, has been partially superseded in recent times by the improper substitute, positive law. *Jus Positivum* was a title invented by medieval jurists to denote law made or established by human authority as opposed to the *Jus Naturale* which was uncreated and immutable. It is from this contrast that the term positive derives all its point and significance. It is not permissible, therefore, to confine positive law to the law of the land. All law is positive that is not natural. International law, for example, is a kind of *Jus Positivum*, no less than the civil law itself."

### Suggested Readings

Bodenheimer : Jurisprudence.



- Bryce : Studies in History and Jurisprudence.  
Cahn, E. N. : The Sense of Injustice.  
D' Entreves : Natural Law.  
Friedmann : Legal Theory.  
Haines : The Revival of Natural Law Concepts.  
Jones : Historical Introduction to the Theory of Law.  
Maine : Ancient Law.  
Pollock : Essays in the Law.  
Pound : An Introduction to the Philosophy of Law.  
Pound, R. : Harvard Legal Essays (1934).  
Ritchie, D.G. : Natural Rights,  
Rommen : Natural Law (1947).  
Troeltsch : Natural Law & Humanity.  
Vinogradoff : Commonsense in Law.  
Wright : The American Interpretation of Natural Law.
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## CHAPTER IV

### CIVIL LAW

Civil law is the law of the lawyers and the courts. It is this law which is recognized and enforced in everyday life. Volumes have been written to explain the growth of civil law.

#### **Different Meanings of Civil Law**

The term Civil law is used in different senses. It is used to imply the Civil law of Rome as distinguished from the law of the church. These two systems were distinct and separate and both of them helped the growth of law in European countries. The term is also used to indicate the whole of Roman law as distinguished from the English law. It is also used to distinguish it from the penal law of the country. We usually refer to the civil law and criminal law in a country. On account of the ambiguity in the meaning of the term 'civil law', the terms municipal law and positive law have been suggested as substitutes but still the term civil law is preferred.

#### **Distinction between Law, the Law and a Law**

The terms law, the law and a law do not have the same meaning. According to Gray, "*A law* means a statute passed by the legislature of a State. *The law* means the whole system of rules applied by a State." The term 'law' is used in the abstract and concrete sense. In the first case, it means the entire body of rules applied by courts in the administration of justice. In the second case, it means the particular decrees, enactments and rules. The term used in this case is 'a law' and its plural is 'laws'.

It is pointed out that "all law is not produced by laws and all laws do not produce law". This means that law in the abstract sense consists not only of particular laws but also of customs and precedents. It also means that it is not necessary that a particular law should produce law in the abstract sense. There are laws which serve the particular purposes and do not give rise to law in the abstract sense. Examples of such laws are the Act of Attainder, an Act of Parliament granting divorce, etc.

#### **Sanction**

The term sanction is derived from Roman law. Originally, the Sanctio was that part of a statute which provided for a penalty and the enforcement of the provision. By slow degrees, the term sanction came to imply penalty. However, that is not the only sense in which this term is used. To quote Salmond, "A sanction is not necessarily a punishment, a penalty. To punish

law-breakers is an effective way of maintaining the law but it is not the only way. The State enforces the law not only by imprisoning the thief but by depriving him of his plunder and restoring it to the true owner; and each of these applications of the physical force of the State is equally a sanction." Again, "The instrument of coercion by which any system of the imperative law is enforced is called a sanction and any rule so enforced is said to be sanction. Thus physical force in the various methods of its application is the sanction applied by the State in the administration of justice. Censure, ridicule and contempt are the sanctions by which society enforces the rules of positive morality. War is the last and most formidable of the sanctions which in the society of nations maintains the law of nations. Threatening of evils to flow here or hereafter from divine anger are the sanctions of religion, so far as religion assumes the form of a regulative or coercive system of imperative law."

Reference may be made to the various *theories regarding sanction*. According to writers like Hobbes, Locke and Bentham, sanction implies either punishment or reward. To quote Lock "For since it would be utterly vain to suppose a rule set to the free actions of men, without annexing to it some enforcement of good and evil to determine his will, we must, wherever we suppose a law, suppose also some reward or punishment annexed to that law." However, this view is not accepted by Austin. According to him, the evil is the sanction. To quote him, "It is only by conditional evil that duties are sanctioned or enforced. It is the power and the purpose of inflicting eventual evil and not the power and purpose of imparting eventual good which gives to the expression of a wish the name of a command." Again, "When there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command and therefore imposes a duty. Sanction is evil incurred or to be incurred by disobedience to command. Physical compulsion must be distinguished from sanction. The compulsion implied in duty and obligation is hate and fear of an evil. All other compulsion or restraint may be termed physical."

According to Bentham, reward is a form of sanction as the failure to win and reward is also followed by pain. However, this view is not accepted on the ground that sanction arises where some duty is violated but in the case of reward, no one is bound by any duty to win the same. If a law is violated sanction makes the position of the offender worse but there is no effect if the reward is not won. The only effect is that his position does not become better. A sanction is an inducement to avoid a penalty or pain but reward is merely an inducement to gain.

There are many *kinds of sanctions*. In the words of Pollock, "Taken thus largely, there are sanctions of infinite degrees from obscure monitions of conscience to general and open reprobation or even acts of violence prompted by the indignation of one's

fellow-men and, if we pass from the moral and social to the legal sphere, from some small expense or disadvantage in the conduct of a law-suit or some small penalty for delay in performing a public duty, to the severest penalties of criminal jurisdiction." The sanction may be of a civil or criminal nature. Both in civil and criminal cases, there is a wrong complained of. However, in civil cases, the wrong complained of amounts to a claim of right, but in criminal cases, it amounts merely to prevention of wrong. In a civil case, it consists in the enforcement of a right but in a criminal case, it consists in the punishment of wrong. Civil sanctions are enforced at the discretion of the injured party but criminal sanctions are enforced at the discretion of the State.

*Legal sanctions* can be divided into two categories, civil and criminal. As regards criminal sanctions, those are in the nature of capital punishment, imprisonment, corporal punishment, fine and the deprivation of civil rights. In the case of civil sanctions, those are in the form of damages, nullity, costs, restitution of property, specific performance and injunctions. There are two categories of injunctions and those are prohibitory injunctions and mandatory injunctions. Damages are also of two kinds, liquidated and unliquidated. As regards liquidated damages, those fall in four categories *viz.*, nominal, ordinary, special and vindictive.

It is to be observed that in the case of divine law, sanction is in the form of evils which flow from divine anger. In civil law, the sanction is the "sword of the state." The sanction in the case of moral and social rules is the loss of public opinion. In the case of international law, sanction is in the form of economic blockade, war, etc.

Sanction always operates on desire. It affords a choice between two pains. There is a desire to gain illegally. If the pain which is to follow in case of a breach of law is greater than the satisfaction to be derived by following one's desire, the person would hesitate to violate the law. The child of a person is sick and he is hurrying with all the speed to the doctor. The policeman gives a signal to stop him. If he obeys the policeman, he suffers mentally as he wants to reach the doctor as quickly as possible. If he disobeys the policeman, he is bound to be punished for the breach of traffic rules. Thus, the person has to make a choice whether he is prepared to suffer the first or second pain.

Reference may be made to the *sanction of nullity*. This means that when a person enters into a contract, he must fulfil all the formalities prescribed by law. If the document requires to be stamped, the same should be properly affixed. If it requires registration, the same should not be omitted. The reason is that if the above formalities are not carried out, the courts will refuse to recognise them and enforce them. The threat of non-recognition is the sanction behind them. To take one example, if a promote

does not bear any stamp, the creditor cannot sue upon the same and thus he loses all his money. This fear compels him to affix the requisite stamp at the time of execution.

There are different views with regard to the *connection between law and sanction*. According to one view, the relation between the two is so intimate that one is not possible without the other. To quote Hobbes, "It is men and arms that make the force and power of the laws." According to Ihering, "Law without sanction is like the fire that does not burn and like the light that does not shine." According to Pollock, "The appointed consequences of disobedience, the sanction of law as they are commonly called, seem to be not only a normal element of civilized law but a necessary constituent. Law without a sanction and that sanction in the hands of the State, can, in this way of thinking, easily appear like a contradiction in terms." According to Salmond, "The Civil law has its sole source, not in consent or in custom or in reason, but in the will and power of him who in a commonwealth beareth not the sword in vain."

However, this view is not accepted by other writers. According to them, the idea of sanction is useless and there is no place for sanction. To quote Vinogradoff, "Though commonly present, it is not absolutely necessary to constitute a legal rule; and that while we may look upon it as the most convenient means of enforcing law, we cannot regard it as the essence of legal relations. Clearly it has to be supplemented by restraints based on personal recognition and public opinion." According to Miller, "The machinery may include a sanction or artificial motive, but in all societies the laws imposed or recognized are enforced and obeyed without an artificial sanction because, if men are to live, they must act in some way, and in society it is generally found that the path of the law is a path of least resistance." Bryce refers to the various reasons as to why people obey the law of the state. Those are indolence, deference, sympathy, reason and fear. According to Duguit, the idea of sanction is absolutely superfluous. Similar views are held by writers like Laski and Justice Holmes. To quote Laski, "Law has finally to make its way to acceptance through channels of mind."

We may conclude this discussion on sanction with the following words of Paton: "It is difficult to conceive of any legal system operating effectively without a sanction in the background—the weakness of international law clearly illustrates this. But once a community is taught to observe the law, particular rules may be obeyed, even though there is no particular sanction attached to them. We cannot say *a priori* that a particular rule is law only if it has a specific sanction—the test is whether the rule is regarded as law by the particular legal order in question."

### **Justice According to Law**

In modern times, what is given by the courts to the people is

not what can really be called justice but merely justice according to law. It is pointed out that judges are not legislators. It is not their duty to correct the foolish provisions of law. Their only function is to administer the law of the country. The judges are not expected to ignore the law of the country. It is rightly stated that "in the modern State, the administration of justice according to law is commonly taken to imply recognition of fixed rules."

According to Salmond, "Law is a gradual growth from small beginnings. The development of a legal system consists in the progressive substitution of rigid pre-established principles for individual judgment and to a large extent these principles grow up spontaneously within the tribunals themselves. That great aggregate of rules which constitutes a developed legal system is not a condition precedent of the administration of legal system but a product of it. In course of time, justice becomes justice according to law and courts of justice become courts of law. The result is that the free discretion of a judge in doing right is excluded by predetermined rules of law." Again, "That it is on the whole expedient that courts of justice should thus become courts of law, no one can seriously doubt. Yet the elements of evil involved in the transformation are too obvious and serious ever to have escaped recognition. Laws are in theory as Hooker says 'the voice of right reason; they are in theory the utterances of justice speaking to men by the mouth of State but too often in reality they fall short of this ideal. Too often they turn judgment to wormwood and make the administration of justice a reproach. Nor is this true merely of the earlier and ruder stages of legal development. At the present day our law has learnt in a measure never before attained, to speak the language of sound reason and good sense, but it still retains in no slight degree the vices of its youth; nor is it to be expected that at any time we shall altogether escape from the perennial conflict between law and justice. It is needful, therefore, that the law should prove the ground and justification of its existence.'"

A few illustrations may be given to show as to what we understand by saying that justice should be given according to law. A creditor has to realise some money from a debtor. However, he files the suit after the lapse of three years. Equity may be on the side of the creditor but his suit is bound to fail on account of the law of limitation which demands that a suit must be filed within three years. Likewise, a person may have actually committed a murder. He may confess the same before a police officer who is an honest man. However, he does not make a confession before a magistrate. If he is convicted on the basis of his confession before the police officer, his conviction has to be set aside. The conviction is opposed to the law of the country. It is clear from above that even if a guilty person escapes, judges are not bothered about the same. They do not play and are not expected

to play the role of legislators. If law is defective, it is the duty of the people to demand from their legislators to alter the same. However, so long as a particular law remains on the statute book, the same has to be enforced unmindful of the consequences. Law may be blind and justice has also to be blind, but there is no help for it. *Judges are expected to give justice according to the law of the country and not according to what they consider to be just under the circumstances.*

### Uses of Law

There are many advantages of the fixed principles of law. (1) They provide *uniformity and certainty* to the administration of justice. The same law is to be applied in all cases. There is to be no distinction between one case and another case if the facts are the same. Law is no respecter of personalities. Not only this, law is also certain. The legal system of a country is put down in black and white and it is possible for all the people to know the law of the land. No wonder, it is presumed that every individual living in the country knows the laws of the land. The uniformity and certainty of law add to the convenience and happiness of the people. The rules of the road make it possible for millions of people to drive with relative safety. Without these rules, it would have been impossible for them to attend their offices daily. Society is becoming complicated and without the existence of elaborate laws, it is not possible to regulate the same.

(2) The existence of the fixed principles of law avoids the *dangers of arbitrary, biased and dishonest decisions*. To quote Locke, "The legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to dispense justice and to decide the rights of the subjects by promulgating standing law and known, authorised judges." According to Cicero, "We are the slaves of the law that we may be free." According to Hooker, "The law doth speak with all indifferency; that the law hath no side respect to their persons." The judges cannot afford to give arbitrary decisions. They have to act according to law. There is less scope for dishonesty and personal bias. They are bound to be impartial. Their duty is merely to interpret the law and not to reform the same. The judges are not expected to be reformers. They have to restrict their function to the enforcement of the law of the land as it is.

(3) The fixed principles of law protect the administration of justice from the *errors of individual judgment*. In most cases, the law on the subject is very clear and the judges are not expected to twist the law. They are not allowed to substitute their own opinion for the law of the country. Experience shows that people have lived happier lives when they are ruled by the fixed principles of law than when there are no laws as such. There is going to be greater mischief if we allow the judges to decide every case

according to what seems to them to be the best. According to Aristotle, "To seek to be wiser than the law is the very thing which is by good laws forbidden." According to Salmond, "The law is not always wise, but on the whole and in the long run, it is wiser than those who administer it."

### Disadvantages of Law

Reference may be made to some of the advantages of fixed principles of law. (1) The first defect is that such a system makes the *law rigid*. An ideal legal system is one which keeps on changing according to the changing needs of the people. Law must adjust itself to the needs of the people and it cannot isolate itself from them. However, law is not usually changed to adjust itself to the needs of the people. There is always a gap between the advancement of the people and the legal system of a country. The lack of flexibility in law is not always to be desired.

(2) There is also the *conservative nature of law*. Both the lawyers and the judges favour the continuation of the law in the existing condition. The result is that very often law is static. Such a system is not useful for a progressive society.

(3) Law is *formal* in its nature. More emphasis is put on forms than on substance. Very often, a lot of time is wasted in raising technical objections which have nothing to do with the merits of the case in dispute. While insisting on the formalities of law, injustice may be done in very many cases. While the innocent may suffer, the clever and the crooked may profit thereby.

(4) Another defect of law is its undue and needless *complexity*. It is true that every effort is made to make the law as simple as possible but it is not possible to make every law simple. That is due to the complex nature of modern society. Moreover, lawyers insist on drawing fine distinctions on the various points of law. There is a lot of hair-splitting. All this does not bring justice nearer but merely helps the clever and the crooked. It is true that some of the defects can be removed by means of codification but the difficulty with codification is that within a few years, so much of case law comes into existence that the real law of the country cannot be understood by a reference to the code alone. Law must change with the changing conditions but it is impossible to change the codes so frequently.

It may be stated that we cannot avoid having fixed principles of law in a country. The advantages are more than the disadvantages. However, every effort should be made to change the law as frequently as desirable. It is the business of the legislators to be always up and doing and change the law according to the changing requirements of the people.

### Question of Law

All questions that arise before law-courts can be divided into



two categories. Some of them are questions of law and others are questions of fact. According to Salmond, the term "Question of law" is used in *three different senses*. (1) In the first place, it means a question the answer to which has already been declared by some rule or principle which the courts consider they ought to apply without regard to their personal opinions as to its desirability. It is a question of law to decide as to how much punishment should be awarded for the offence of murder. The same can be said with regard to the violation of laws regarding gambling, dacoity, kidnapping, cheating, etc. It is already provided in the penal law of the country as to what punishment should be given and the judges cannot substitute their own opinion for that of the law of the country. (2) Secondly, a question of law implies as to what law is. Questions of law arise on account of their uncertainty. If the law on any point is clear, there is no necessity of any question of law in this sense. When a question arises for the first time with regard to the interpretation of a particular point, the term is used in these senses. It is the duty of the judges to decide as to what was the true meaning of the words used by the Legislature. Once a decision has been given on any point, the same becomes binding in similar cases in the future. (3) As regards the third sense in which this term is used, reference is made to the general rule that *questions of law are for the judges and questions of fact are for the jury to decide*. It is true that questions of law are never referred to the jury, but questions of fact can be referred to the judge. The interpretation of a particular document is merely a question of fact but very often it is done by the judge himself. Likewise, the question of reasonable and probable cause for prosecution in a suit for malicious prosecution is decided by a judge although it is a question of fact. According to Paton, although a judge lays down the law and the jury applies it to facts and arrives at a conclusion, that is a mixture of law and fact and not fact alone.

The maximum punishment for various offences is laid down in the penal laws of a country and is a question of law. It is a question of law in India that a child under seven years of age is incapable of committing a crime. The interpretation of a document is a question of law. It is for the judge to decide whether evidence on a certain point proves a particular point or not.

### Question of Fact

The term question of fact has more than one meaning. *In a general sense*, it includes all questions which are not questions of law. Everything is a matter of fact which is not a matter of law. According to Salmond, a question of fact means either any question which is not pre-determined by a rule of law, or any question except the question what the law is or any question which is to be answered by the jury instead of by the judge. *In a narrower sense*, a question of fact is opposed to a question of judicial discretion,

which includes questions as to what is right, just, equitable or reasonable. Evidence can be led to prove or disprove a question of fact. It can be proved by evidence whether a particular person lives at a particular place or not and it is a question of fact. However, it is a question of law to decide as to how much punishment should be imposed for any particular offence. It is a question of fact whether the offence of adultery has been committed or not but it is a question of law to decide as to what punishment should be given to the adulterer.

A question of fact is a matter of fact as opposed to a matter of opinion. Evidence is given to ascertain the true facts of the cases. It can also be proved by means of demonstrations. However, a question of opinion cannot be proved by demonstrations or by evidence.

Regarding the distinction between questions of law and fact, Paton observes thus : "However difficult it may be to define the exact difference between law and fact, the distinction itself is fundamental for any legal system. Law consists of the abstract rules which attempt to reduce to order the teeming facts of life. Facts are the raw material on the basis of which the law creates certain rights and duties." According to Salmond, all matters and questions which come before a court of justice are of three kinds, *viz.*, matters and questions of law, matters and questions of judicial discretion and matters and questions of fact. In the first case, it is the duty of the court to ascertain the law and decide the case accordingly. In the second case, the court can exercise its own judgment and decide the dispute according to what it considers to be right, just, equitable or reasonable. In the third case, it is the duty of the court to weigh the evidence and then come to its conclusion. As the legal system grows, there is a tendency to transform the questions of fact and questions of judicial discretion into those of law. As the case law increases and legislative activity grows, the scope for moral judgment of the court becomes narrower. Even in questions of pure fact, there are already predetermined and authoritative answers.

According to Parker, actual cases may involve questions of law, fact and discretion at the same time. Whether a company should be wound up involves the question of fact as to what was done when it was as alleged created, the question of law whether this was sufficient to create a company, the question of fact as to its present assets and liabilities and the question of discretion whether in view of the circumstances, it is just and equitable that it should be wound up.

### **Questions of Fact and Discretion**

Questions of fact are questions of what actually is and questions of discretion are questions of right and of what ought to be. In questions of fact, the court tries to find out the truth. In ques-

tions of discretion, the object of the court is to determine as to what is just. Questions of fact have to be proved by evidence and demonstration but questions of discretion are subjects of reasoning and argument. It is a question of fact whether a particular person has committed a crime or not and this can be proved or demonstrated. However, it is a question of discretion for the court to decide as to what punishment should be given to a person who has been found guilty of a particular offence. Likewise, it is a question of fact whether a valid contract subsists between the parties or not and whether a breach of the contract has taken place or not. However, it is a question of discretion as to how much damages are to be awarded or whether the specific performance of the contract has to be enforced.

### **Mixed Questions of Fact and Law**

Experience shows that in actual practice, questions of law and fact are mixed. In the same case, we have to decide not only the questions of law but also the questions of fact. The question of discretion has also to be taken into consideration. If there is a dispute as to whether a partnership exists among certain parties or not, it is a question of fact as to what is the basic relationship between the parties. It is a question of law as to whether the basic relationship between parties constitutes a partnership in the eye of law or not. Thus, we have a mixed question of law and fact. Very often, in criminal cases, the questions of fact are decided by the members of the jury and questions of law are decided by the judge and both of them are involved in the same case.

### **Transformation of Questions of Fact into Law**

It has rightly been pointed out that "the existence and development of a legal system represents the transformation to a greater or less extent of questions of fact and judicial discretion into questions of law". As more and more cases are decided, identical decisions are given by the judges in those cases which have similar facts. Old case law is quoted in fresh cases. If the facts of the two cases are identical, the discretion of the judge disappears and he is bound to give his decision according to the precedent on the subject. To a lesser extent, even the questions of fact are converted into questions of law. If similar facts are to be found in two cases, the conclusion arrived at in the previous case is also the conclusion arrived at in the next case. Our study of law shows that the presence of certain circumstances is taken to constitute fraud and when similar facts are found in a particular case, the court presumes fraud. In this way, questions of fact and discretion are transformed into those of law.

### **Discordance between Fact and Law**

Salmond rightly points out that "the law is the theory of things as received and acted upon within the courts of justice and this theory may or may not conform to the reality of things outside". It is

not necessary that whatever is considered to be just or proper will also be lawful. A poor man owes money to a rich man but he cannot afford to pay the same. Although morally it is desirable that the poor man should not be pressed to pay the money, it is absolutely lawful for the rich man to enforce his right against the poor man. Law of the country may presume a particular fact to exist while the same does not really exist. Likewise, law may presume a particular fact not to exist while it actually exists. The Indian Penal Code lays down that the child who is below the age of seven is not capable of committing a crime. This is a presumption of law but it is possible in a certain case that a child who is below seven may understand what he is doing and he may have murdered some person deliberately. It is obvious that there is discordance between law and fact.

“The eye of law does not infallibly see things as they are. Partly by deliberate design and partly by errors and accident of historical developments, law and fact, legal theory and the truth of things, may fail in complete coincidence.” The discordance between law and fact may be due to many causes. In some cases, law may depart from the fact deliberately. In other cases, it may be due to pure accident. It may also be due to the conditions under which a particular principle of law has developed. This can be illustrated by examples. There are many share-holders of a limited company. They all have their separate personalities but law gives a fictitious personality to the company itself. Obviously, a limited company can have no personality of its own different from its members. In the eye of law, a Hindu idol has a personality of its own. In these cases, law departs from the truth by deliberate design. A child is adopted by a person from another family. In the eye of Hindu law, the adopted child is supplanted from the house of the natural father into that of the adopted father. This is merely a legal fiction which is due to the accident of historical development of Hindu law. The King of England is regarded as a corporation sole. A particular King may die and he may be succeeded by another, but the King as a corporation never dies.

The discordance between law and fact is brought about by means of *fiction and presumptions*. According to Sir Henry Maine, a fiction means “any assumption which conceals or tends to conceal the fact that the rule of law has undergone any alteration, its letter remaining unchanged but its operation being modified.” According to Salmond, a fiction is a device by which law deliberately departs from the truth of things whether there is any sufficient reason for the same or not. Examples of some of the legal fictions have already been given above. It has already been pointed out that by means of a legal fiction, a child can be adopted from one family to another family. Likewise, a limited company is given a personality in the eye of law which is distinct from that of its members.

Case law is also based on a legal fiction that while enacting a particular rule of law, the Legislature had a particular intention. If a particular term has been given a definite meaning by the courts of law of the country and the same term is used by the Legislature in another enactment or in the revised edition of the same law, it is presumed that the Legislature has accepted the particular interpretation put on it by the courts of law of the country.

It is to be observed that *fiction played an important part as a source of law in ancient times*. There was a rule of procedure in Rome by which a non-Roman was allowed to make a false allegation that he was a Roman and thereby Praetor Urbanus was able to try the case of a non-Roman. The fiction of citizenship was adopted merely for the purpose of extending the Roman law to the non-Romans. In the same way, the English courts of justice resorted to various kinds of fictions for the purpose of adding to their jurisdiction. The Court of Exchequer got jurisdiction over civil cases by means of a legal fiction that the plaintiff was the debtor of the king. Likewise, the Court of King's Bench got jurisdiction over civil cases by the fiction that the defendant was in custody for the breach of peace. It is obvious that the fictions adopted by the courts did not actually exist. They were merely adopted as devices to add to the jurisdiction of the courts.

According to Gray, *historical fictions* were the means which were employed in the past for the development of law. It is pointed out that the people were conservative and it was not possible to change the law boldly and directly. Various devices were employed to change the law in effect without changing its letter.

The old Roman law was laid down in XII Tables and additions were made to it by the *Responsa Prudentium* or the judgments of the men learned in law in Rome. The interpretations put by them may never have been within the contemplation of the compilers of the XII Tables but still those were regarded as valid. The law was actually altered although the fiction was maintained that the same was not changed at all.

In England also, the fiction of interpretation helped the growth of law. It was maintained that justice was administered according to the ancient and immemorial customs of the realm. Even when new cases came up for decision before courts of justice, the presumption was that those were to be disposed of according to the pre-existing rules of law. However, as a matter of fact, while giving judgments in new cases, the courts did not hesitate to change the old law. Thus, the law continued to grow although the fiction was maintained that the ancient customs were being adhered to.

The view of Sir Henry Maine was that while in undeveloped societies there was the necessity of fictions, that was not the case

under modern conditions. The people are not conservative and law can be changed to meet the needs of the people. Fictions stand in the way of the proper classification of law. No wonder, legislative amendments have to be preferred to legal fictions.

However, that is not the view of Sir Frederick Pollock. According to him, the age of fictions is not gone. Even in modern times, we require the help of fictions. Reference can be made in this connection to the personality of a limited company as distinct from its members. The same is the case with the conception of constructive possession, constructive trust and constructive fund. A property may be in the actual possession of X but the same may be in the constructive possession of Y, the owner. No trust may have been created but law may presume the same. The same may be the case with fraud. By fiction, a Hindu child in the womb becomes entitled to family property. A gift can validly be made to a child in the womb. These fictions are given the title of *dogmatic fictions* by Gray. The latter also comes to the conclusion that "fictions of the dogmatic kind are compatible with the most refined and most highly developed systems of law."

### Presumption

A legal presumption is a rule of law by which the courts and judges draw a particular inference from particular facts or from particular evidence unless and until the truth of that inference is disproved. One fact is recognized by law as a sufficient proof of another fact although in truth it may not be sufficient to support that view. The presumption is that a person who is not heard of for seven years is presumed to be dead although actually he may not be dead at all. An accused person is presumed to be innocent until the contrary is proved.

Presumptions are of *two kinds*, viz., presumptions of law and presumptions of fact. *Presumptions of law* can be further subdivided into two parts: rebuttable and conclusive presumptions. In the case of *rebuttable presumptions*, if sufficient evidence is given to contradict a particular inference drawn by the court, the latter is bound to reject the presumptions. In the case of *conclusive presumptions*, on the proof of one fact, the court shall regard the other to have been actually proved and shall not allow further evidence. For example, if a child is born during the continuance of a marriage and within 280 days after its dissolution, it shall be conclusively taken to be legitimate. Presumptions of fact are the inferences which can be drawn from facts but it is not binding on the courts to do so. Such presumptions or inferences are drawn from human experience and observation.

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### Law and Equity

Up to the passing of the Judicature Act of 1873, there were

two distinct systems of law in England, administered by two different sets of tribunals. The Common Law was administered by the ordinary courts of justice, *viz.*, the King's Bench, the Court of Common Pleas and the Exchequer. In the court of Chancery, the Chancellor decided cases not according to the common law but according to the principles of equity. However, the old system was superseded by the Act of 1873 which provided for a High Court of Justice with a Court of Appeal over it. The High Court of Justice was divided into five divisions: the Chancery, the Queen's Bench, Common Pleas, Exchequer and the Probate and the Divorce and Admiralty. The object of the Act was not to fuse the two systems of law but to amalgamate the two types of courts.

According to Prof. Friedmann, "From the time when equity hardened into a body of fixed legal rules supplementing the common law, the difference between the two branches of the law became mainly a matter of technique and professional tradition. The distinction between the Chancery Bar and the common law Bar is still jealously maintained in England, while New South Wales and a few of the United States' judicial systems (*e. g.*, Delaware) have even preserved equity courts. But no lawyer could afford to ignore either of the two branches, since such matters as the law of real property and the law of contract simply cannot be understood today without a knowledge of both systems. The insistence upon the continued separation of the two branches by the legal profession, even after the Judicature Acts, has, however, had a retarding effect upon the development of certain parts of the law. A prominent example is the law of quasi contract, in which Lord Mansfield attempted to fuse legal and equitable principles. Professional conservatism killed his attempt, or at least delayed it until the present day. By overcoming this conservatism, American law was able to develop this part of the law to very much greater importance. However, the separation of law and equity is now more a matter of professional etiquette than a matter of vital importance in either English or American law, while a number of American States have actually abolished the difference altogether." (PP. 493-494, Legal Theory).

### **Territorial Nature of Law**

Salmond rightly points out that law is thought of and spoken of as being the law of a particular territory and not of a particular court. We refer to the law of India or the Punjab and not to the law of the High Court or of a Sessions Court. It is not necessary that the law must be the same throughout the country. It may vary in various parts. The civil law of Scotland is different from that of England. Likewise, in the U. S. A., there are three kinds of civil laws. One kind of civil law is to be found in the constitutional law of the country which

fixes the sphere of action of the Federal Government and the States. Another kind of civil law operates in the whole of the U. S. A. but is administered by the Federal Courts in those cases which are within the jurisdiction of the Federal Courts. There is another kind of civil law which operates in the various States of the U. S. A.

Ordinarily, the authority of the law of State does not extend beyond its territory. Only those offences are punished by the courts of the country which are committed on the soil of that country. However, there are certain *exceptions* to the general rule. It is provided by the English law that even if the offence of bigamy, treason or murder is committed outside the British territory, English courts can take cognizance of them if the offender comes within the reach of their power. In the case of *Penn v. Lord Baltimore*, the English court of equity acted on the maxim that equity acts in *personam* and took cognizance of the case although the transaction had taken place beyond its jurisdiction. English courts claim jurisdiction in all those cases which happen on the English ships. States like Turkey claim jurisdiction over foreigners for crimes committed abroad if the victims are their subjects and the foreigners come into their country. In the case of the law of procedure, the same applies to the particular courts and not to any territory. We refer to the procedure of the High Court and the Supreme Court. However, the ultimate sanction behind the law of procedure is also the authority of the State. Moreover, civil law may be personal generally, but it may be regarded as territorial because developed States do not normally enforce it outside their territory.

### **General Law and Special Law**

According to Salmond, the whole body of law can be divided into two parts : general law and special law. General law consists of the general or the ordinary law of the land and special law consists of certain other bodies of legal rules which are so special and exceptional in their nature, sources or application that it is inconvenient to treat them as standing outside the general and ordinary law. General law consists of those legal rules which are taken judicial notice of by the courts whenever there is occasion for their application. Special law consists of the legal rules which the courts will not recognise and apply them as a matter of course but which must be specially approved and brought to the notice of the courts by the parties interested in their recognition. According to Salmond, *the test of distinction is judicial notice*. By judicial notice is meant the knowledge which any court, *ex-officio*, possesses and acts on, as contrasted with the knowledge which a court is bound to acquire on the strength of evidence produced for the purpose. For example, the court is presumed and bound to take judicial notice of the fact that



there is monarchy in England and a Republic in India. This fact need not be proved by leading evidence. Examples of general law are the law of contract as found in the Indian Contract Act, the penal law of India as found in the Indian Penal Code, etc. However, the law with regard to prohibition, gambling etc. is special law and has to be determined by a reference to the relevant clauses of the particular law enforced in any territory. If any party relies on a particular law, it must bring it to the notice of the court.

### **Kinds of Special Law**

Salmond refers to six kinds of special law and those are Local law, Foreign law, Conventional law, Autonomic law, Martial law and International law as administered in prize courts.

(1) As regards the *local law*, it is the law of a particular locality and not the general law of the whole country. Local law is of two kinds, local customary law and local enacted law. Immemorial custom in a particular locality has the force of law in that locality. It prevails over the general law of the land. Reference may be made in this connection to the customary law of the Punjab. As regards local enacted law, it has its source in the local legislative authority of boroughs and other self-governing communities who are allowed to make their by-laws. Similar powers are given in India to the District Boards, Municipalities and Panchayats. All the local customs and local laws are recognised and enforced by the courts although they do not form a part of the general law of the country.

It is pointed out that in a sense, local law is older than the general law. The general or common law of England was brought into existence by the activities of the travelling judges in England. However, even before their time, there was the customary law of the local communities. It was later on that the position was reversed.

(2) In some cases, *foreign law* has to be taken into consideration if justice is to be done to the parties concerned. For example, in the case of a contract entered into in a foreign country, justice cannot be done fully unless the case is decided according to the law of the place where the contract was entered into. Foreign law is nothing but the body of legal principles recognized and applied by the courts in the administration of justice although the same is not a part of the general law of the country.

Every State has evolved a set of rules which prescribe the conditions and circumstances in which foreign laws are enforced by its courts. This is done for the sake of international comity. There is some sort of reciprocity in this matter and if one State

accepts them, it can expect the same from other States. However, if the foreign law on any particular point is repugnant to the law of the country, the municipal courts are not bound to enforce the same. In the case of *Robinson v. Bland*, a contract to pay a gambling debt was entered into in France between Englishmen and made payable in England. It was held by Lord Mansfield that although such a law was valid in the eye of French law, the same was illegal in England and consequently the English courts were not bound to enforce the same. The rules which regulate the application of foreign law are known as the Conflict of Laws or Private International Law. The rules of Private International Law may vary from State to State. Thus, the French have different rules from those of England. The same is true of the U. S. A. It is to be noted that Public International Law is concerned with States but Private International Law is concerned with individuals and never the States.

In is generally stated that the ignorance of law is no excuse and the offender has to take the consequences of his action. However, the same does not apply to foreign law. The ignorance of foreign law is like ignorance of a fact and excused.

(3) *Conventional law* has its source in the agreement of those who are subject to it. An agreement is a law for those who make it. The general rules laid down in an agreement for the determination of the rights and liabilities of the parties may be regarded as the rules of law which the parties have agreed to substitute or add to the rules of general law. Although conventional law is law between the parties to the agreement, it does not form a part of the general law of the land as this law is not general in its application. The rules of a club or a co-operative society, the Articles of Association of a company, Articles of Partnership, etc., are examples of conventional law.

(4) By *Autonomic law* is meant that species of law which has its source in various forms of subordinate legislative authority possessed by private persons and bodies of persons. A railway company may make by-laws for regulating its traffic. A university may make statutes for the government of its members. An incorporated company can alter its Articles and impose new rules and regulations upon the shareholders. Although they are not incorporated into the general rule of the country, yet these rules are constituted by the exercise of autonomous powers of private legislation.

Autonomic laws are made by autonomous bodies for the government of their own members. Autonomy has been defined by Gierke as the power of a properly organized association which is not a state to make law itself.

If we compare *autonomic law* with *conventional law*, we find that both of them are made by the very persons whom they are intended to govern. However, conventional law binds only those who actually agree to its authority, but autonomic law has authority even on the dissentient minority.

(5) *Martial Law* is the law applied by courts-martial in the administration of military justice. Martial law is of three kinds. It is the law for the discipline and control of the army itself and is commonly known as the military law. It affects the army alone and never the civil population. The second kind of martial law is that by which in times of war, the army governs any foreign land in its military occupation. The country is governed by the military commander through the prerogative of sovereign. The law in this case depends upon the pleasure of the military commanders. The third kind of martial law is the law by which in time of war, the army governs the realm itself in derogation of the civil law so far as the same is required for public safety or military necessity. The temporary establishment of military justice can be justified on the ground of necessity. *Inter arma, legis silent*. The establishment of a military government and military justice is known as the proclamation of martial law. The courts cannot question the validity of the actions of the military commanders so far as the same are done in good faith. According to Wade and Phillips, the term martial law means the power exercised by a military commander in occupation of a foreign territory. The term 'martial law' is also used to describe the action of the military when, in order to deal with an emergency amounting to a state of war, they impose restrictions and regulations upon civilians in their own country.

According to Lord Halsbury, "It is by this time a very familiar observation that what is called martial law is no law at all. The notion that martial law exists by reason of the proclamation is an entire delusion. The right to administer force against force in actual war does not depend upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous from time to time, to authorise what are called 'courts' to administer punishments, and to restrain by acts of repression the violence that is committed in time of war. But to attempt to make these proceedings of so-called 'courts-martial' administering summary justice under the supervision of a military commander analogous to the regular proceedings of courts of justice is quite illusory."

According to Sir James F. Stephens, "Martial law is assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an invasion and the restoration of order and lawful authority: (2) the officers

of the Crown are justified in any exercise of physical force extending to the destruction of life and property to any extent in any manner that may be required for that purpose: (3) the Courts-Martial as they are called, are not properly speaking Courts-Martial or Courts at all. They are merely committees formed for the purpose of carrying into execution, the discretionary power assumed by the government. On the one hand, they are not bound to proceed in the manner pointed out by the Mutiny Act and the Articles of War; on the other hand, if they do so proceed, they are not protected by them as the members of the real Courts-Martial might be except in so far as such proceedings are evidence of good faith. They are justified in doing in any form and any manner, whatever is necessary to suppress insurrection and to restore peace and authority of law. They are personally liable in exercise of the powers, even if they act in strict accordance with the Mutiny Act and Articles of War."

### **Martial Law and Military Law**

Although martial law and military law are often used one for the other, there are certain distinctive features of the two. The military law of England is to be found in the Army Act of 1881 and the Acts relating to the auxiliary and reserve forces as subsequently amended. These are supplemented by rules of procedure, by King's Regulations and other regulations, by Royal Warrant, *e. g.*, as to pay and promotion and by Army Orders. The military law governs the soldiers only and offences under it are known as military offences. The soldiers are subject to the jurisdiction of the ordinary courts of law and also of the Courts-Martial. The Courts-Martial try the military offences committed by the soldiers. While the object of military law is to maintain discipline in the army, the object of martial law is to maintain peace in times of emergency. By the proclamation of martial law, the Government is given as much of authority as is necessary to maintain peace. That power may be legal or arbitrary. Martial law is enforced only in time of emergency and as soon as that emergency is over, martial law is withdrawn. Ordinarily, martial law is enforced in time of war, rebellion or disturbance of a very serious nature. However, military law is not temporary law but permanent law, regulating discipline amongst the armed forces. Another distinction is that while the military law is to be found in the Acts of Parliament and the orders issued by the Government from time to time, martial law is based on common law. There is nothing to check the enforcement of martial law by an Act of Parliament. If that is done, martial law and military law come on the same footing.

Martial law cannot be declared in England in times of peace. It was laid down in the Petition of Rights of 1628 that "commis-

sions should not be issued to try persons according to martial law as is used by armies in times of war." The result is that since that time, the Government has not declared martial law in England in times of peace. In England, both the Government and loyal citizens have the power to maintain public order at whatever cost of bloodshed or property. Force can be used to meet force in case of invasion, insurrection, riot, or any violent resistance to law. It was held in the case of *Rex v. Pinney* that it was the duty of every citizen to help the Government to meet any invasion and crush any riot. If a person failed to do so, he was liable to be punished. The amount of force to be used in any particular case depends upon the circumstances of the case.

According to Dicey, martial law cannot be declared even in times of war by the exercise of the prerogative of the Crown. This prerogative has not been exercised since the Petition of Rights of 1628 and has fallen into disuse. It is pointed out that martial law was declared in Jamaica in 1865 and in Ireland in 1920 by an Act of Parliament and not by the exercise of the prerogative of the Crown. The protection given to the military men against the illegal exercise of their powers, is also given by an Act of Indemnity which is also passed by Parliament. "It is difficult to see why Acts of Indemnity should at all be needed if the actions which they retrospectively regularise were legal all the time by virtue of Proclamation." During the World War II, the Government did not proclaim Martial Law by the exercise of the prerogative of the Crown. The Emergency Powers Act was passed in 1940 by the British Parliament and that Act authorised the creation of special war zone courts to act in place of ordinary courts when the invasion actually took place.

(6) *International law* is a kind of conventional law. As a special law, international law refers to that portion of the law of nations which is administered by the Prize Courts of the State in times of war. It is that part of law which regulates the practice of the capture of the ships and cargoes at sea in times of war and is known as Prize Law. International law requires that all States which desire to exercise the right of capture, must establish and maintain within their territories what are known as Prize Courts. It is the duty of those courts to investigate the legality of all the captures of ships and cargoes. If the seizure is lawful, the property is adjudged as a lawful prize of war. If the same is found to be unlawful, orders are passed for the return of the property. Prize Courts are established by and belong exclusively to the individual State by which the ships and cargoes are captured. In spite of that, the law administered by the Prize Courts is the law of nations and not the law of the country. A Prize Court is not an international tribunal but a municipal tribunal but it applies the law of nations. According to Lord Parker, "The law which the Prize Court is to administer is not the national law or as it is sometimes called, the municipal law, but the law of nations—in

other words, international law. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore in one sense be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to law which is not laid down by any particular State, but originates in the practice and usage long observed by civilised nations in their relations towards each other, or in express international agreement. It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is nonetheless true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would, in the field covered by such provisions, be deprived of its proper function of a Prize Court."

### Common Law

The general law of England can be divided into three parts, *viz.*, statute law, equity and common law. Statute law is made by the legislature and equity was developed by the Court of Chancery. According to Salmond, "The common law is the entire body of English law, the total *corpus juris Angliæ*—with three exceptions namely (1) statute law, (2) equity, (3) and special law in its various forms." The expression common law was adopted by English lawyers from the canonists who used it to denote the general law of the church as opposed to those divergent usages which prevailed in different local jurisdictions and superseded or modified within their territorial limits the common law of Christendom. The development of common law is closely associated with the growth of King's justice in England after the Norman conquest. Formerly, justice was administered by the barons in their localities. Later on, the king started sending his travelling judges to the various parts of the country from one central place. Within a very short time, king's justice became popular and his travelling judges gave similar judgments in similar cases in all parts of the country. The result was that instead of different laws in different localities, a system of law common to the whole country came into existence. This came to be known as the common law of the country and was codified in the time of Henry II and Edward I. The common law was supposed to be based upon immemorial usages of the realm.

In the beginning of the 14th century, the Court of the Chan-

cellor came into existence. It gave its decisions on the basis of what was considered to be just and equitable even if there was no provision in the law on a particular point. Both the common law courts and equity courts continued to function separately up to 1873 when the Judicature Act removed the division between the two. The common law courts and equity courts were amalgamated.

### **Constitutional Law**

According to Bouvier, constitutional law implies "the fundamental law of a State directing the principles upon which the government is founded and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise."

According to Wade & Phillips. "There is no hard and fast definition of constitutional law. In the generally accepted use of the term, it means the rules of law, including binding conventions, which regulate the structure of the principal organs of government and their relationship to each other and determine their principal functions."

According to Prof. Dicey, "Constitutional law as the term is used in England, appears to include all rules, which directly and indirectly affect the distribution or the exercise of the sovereign power in the State."

According to Dr. Keith, it is the function of constitutional law to examine the organs by which the legislative, executive and judicial functions of the State are carried out, their inter-relations and the position of the members of the community in relation to these organs and the functions of the State.

### **Sources of English Constitutional Law**

According to Lord Bryce, the English constitutional law is to be found in "the mass of precedents carried in men's memories or recorded in writing, of dicta of lawyers or statesmen, of customs, usages, understandings and beliefs bearing upon methods of government, together with a certain number of statutes, some of them containing matters of petty detail, others related to private just as much as to public law, nearly all of them pre-supposing and mixing up with precedents and customs and all of them covered with a parasitic growth of legal decisions and political habits, apart from which the statutes would be almost unworkable, or at any rate, "quite different from their working from what they really are. The English Constitution is to be found in the great constitutional landmark, statutes, judicial decisions, common law and conventions."

(1) As regards the great constitutional landmarks, those are to be found in the Magna Carta of 1215, the Petition of Rights of

1628, Bill of Rights of 1689, the Act of Settlement of 1701, the Act of Union between England and Scotland of 1707, the Parliament Act of 1911, etc. All these constitutional landmarks form "only the addenda to the Constitution." Although many of them have not been enacted by Parliament, no English statesmen can afford to ignore them.

(2) Another source of the English Constitution is the large number of statutes passed from time to time by the British Parliament. Reference may be made in this connection to the Reform Acts of 1832, 1867, 1884, 1918 and 1928. The Representation of the People Act of 1948 abolished the University Constituencies. The right of a person to vote in a constituency in which he had a "business-premises qualifications" but in which he did not reside was taken away. The present law can be put thus: "The persons entitled to vote in any constituency shall be those resident there on the qualifying date, who, on that date and on the date of the Bill, are British subjects of full age not subject to any legal incapacity to vote." The Abdication Act of 1936, Septennial Act, the Irish Free State Act of 1922, the Municipal Corporations Act, 1935, the Parliamentary and Municipal Elections Act of 1872, the Judicature Acts of 1873-76, the Local Government Acts of 1888, 1894, 1929 and 1933, the Government of Ireland Act of 1920, the Public Order Act of 1936, the Ministers of the Crown Act of 1937 and the Statute of Westminster of 1931 belong to the same category.

(3) As regards judicial decisions, they are also a part of the English Constitution. Reference may be made in this connection to *Bainbridge v. Postmaster General*, (1906), *Beatty v. Gillbanks*, *Wise v. Dunning*, *Godden v. Hales*, *Stockdale v. Hansard*, *Shirley v. Fagg*, *Bradlaugh v. Gosset*, *Ashley v. White*, *Osborne v. Amalgamated Society*, *Attorney-General v. De Keyser's Royal Hotel Co.* (1920), *Liversidge v. Anderson* (1942), *Local Government Board v. Arlidge* (1915), *Entick v. Carrington*, *O'Kelly v. Harvey*, etc.

In the case of *Wilkes v. Wood*, it was held that a general warrant to search for and capture the papers of an unnamed author was illegal. *Leach v. Money* laid down that a general warrant to search or seize an unnamed person was illegal. The case of *Somerset* established the absence of slavery on the English soil. The immunity of the judges was guaranteed by the case of *Howell*. The independence of the juries was established by the case of *Bushell*.

(4) Another source of the English Constitution is common law, which has been defined by Dr. Ogg as "the vast body of legal precepts and usages which through the centuries have acquired binding and almost immutable character." Prof. Munro has rightly remarked that "the common law like statutory law is continual in process of development by judicial decisions." A



common law is a body of judge-made rules which have never been ordained by a King or enacted by a Parliament. The common law is the basis of the prerogatives of the Crown, the right of trial by jury in criminal cases, the right of freedom of speech and assembly, the right to redress grievances against Government officers, etc.

(5) Another source of the British Constitution is the text-books on constitutional law. Anson's Law and Customs of the Constitution, May's Parliamentary Practice, Dicey's Law of the Constitution and Bagehot's English Constitution can be put in this category. These books can be referred to for purposes of ascertaining as to what the law of England is.

(6) However, the most important source of the British Constitution are the conventions of the Constitution. According to Dr. Ogg, they consist of "understandings, practices and habits which alone regulate a large portion of the actual relations and operation of the public authorities." According to Baldwin, "The historian can tell you probably perfectly clearly what the constitutional practice was at any given period in the past, but it would be very difficult for a living writer to tell you at any given period in his life-time what the Constitution of the country is in all respects and for this reason, that almost at any given moment . . . . . There can be one practice called constitutional which is falling into desuetude and there can be another practice which is creeping into use but is not yet constitutional." According to Lord Bryce, the British Constitution "works by a body of understandings which no writer can formulate." It is on account of the existence of a large number of conventions that the British Constitution is said to be convention-ridden.

### **Constitutional Law and Administrative Law**

Reference may be made to the distinction between constitutional law and administrative law. According to Holland, Constitutional law deals with various organs of sovereign powers as at rest, and administrative law deals with those organs as in motion: in other words, the first deals with the structure and the second deals with the functions of the state." Prof. Maitland differed from Holland. His view was that if the view of Holland was accepted, the powers and prerogatives of the Crown would be relegated to the sphere of administrative law which was not correct.

The real distinction between constitutional law and administrative law is one of degree and convenience and not of principle. While constitutional law deals with the general principles relating to organisation and powers of organs of the State and their relations *inter se* and towards the citizens, administrative law is that aspect of constitutional law which deals in detail with the powers and functions of administrative authorities. According to Keith, "It is logically impossible to distinguish Administrative

from Constitutional law and all attempts to do so are artificial."

### **Administrative Law**

The term administrative law or *Droit Administratif* has been variously defined by various writers. According to Barthelemy, *Droit Administratif* in France "consists of all the legal rules governing the relations of public administrative bodies to one another and to individuals." According to Prof. Rene David, "*Droit Administratif* can be defined in France as the body of rules which determine the organisation and the duties of public administration and which regulate the relations of the administrative authorities towards the citizens of the State." According to Prof. Wade, "Administrative law is primarily concerned not with judicial control nor even legislation by delegation but with administration." According to Dr. Jennings, "Administrative law is the law relating to the administration. It determines the organisation, powers and duties of administrative authorities."

The view of Austin was that administrative law determined "the ends and modes to and in which the sovereign powers shall be exercised; shall be exercised directly by the monarch or sovereign member, or shall be exercised directly by the subordinate political superiors to whom portions of those powers are delegated or committed in trust." Prof. Holland divided public law into six divisions and put administrative law in the second category. Constitutional law belonged to the first category and was concerned with structure. Administrative law, on the other hand, was concerned with functions. According to Prof. Robson, the term administrative law implies the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies. According to Prof. Wade, "The organisation, the methods, the powers (whether styled administrative, legislative or judicial), and the control by higher administrative or by judicial authority of all public authorities is the ambit of administrative law in the United Kingdom."

According to Prof. Dicey, "*Droit Administratif*, as it exists in France, is not the sum of the powers possessed or of the functions discharged by the administration; it is rather the sum of the principles which govern the relation between French citizens as individuals, and the administration as the representative of the State." Again, *Droit Administratif* is "that portion of French law which determines (1) the position and liabilities of all State officials, (2) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (3) the procedure by which these rights and liabilities are enforced." Prof. Dicey also quoted the following definition of Aucoc: "Administrative law determines (1) the

constitution and the relations of those organs of society which are charged with the care of those social interests which are the object of public administration, by which term is meant the different representatives of society among which the State is the most important, and (2) the relation of the administration towards the citizens of the State." To quote the same writer, Administrative law is "the body of rules which regulate administration or relations of the administrative authority towards private citizens.

### **Two Leading Principles**

Prof. Dicey referred to two leading principles of *Droit Administratif* of France. The first leading principle was that the Government and its servants possessed special rights, privileges or prerogatives as against the private citizens. The extent of those rights, privileges or prerogatives was determined according to principles which were different from the considerations which fixed legal rights and duties of one citizen to the other. In his dealings with the State, an individual did not stand on the same footing as that on which he stood in his dealings with his neighbour. The second leading principle was the necessity of maintaining the separation of powers. The government, the legislature and the courts were to be prevented from encroaching upon the sphere of one another. While the ordinary judges were to be irremovable and independent of the executive, the Government and its officials in their official capacity were to be independent and act to a great extent free from the jurisdiction of the ordinary courts.

### **Four Distinguishing Characteristics**

Prof. Dicey also referred to what he considered to be the four distinguishing characteristics of administrative law in France. The first distinguishing characteristic was that the relations of the Government and its officials towards private citizens were regulated by a body of rules which were in reality laws, but which differed considerably from the laws which governed the relations of one private person to another. The second characteristic was that the ordinary courts had no concern whatsoever with matters at issue between private persons and the State. Those matters were to be determined by administrative courts which were connected with the Government in one way or the other. There was a feeling in France that "the judges are the enemies of the servants of the State and that there is always reason to fear their attempts to compromise the public interests by their malevolent or at best rash, interference in the usual course of Government business." The third characteristic was the possibility of a conflict of jurisdictions between the administrative courts and the ordinary courts of justice. In such a case, the Court of Conflicts was to settle the question. The Council of State and the Court of Cession

were given equal representation on the Court of Conflicts which was presided over by the Minister of Justice. The fourth characteristic was the tendency to protect from the supervision or control of the ordinary law courts any servants of the State who was guilty of an illegal act provided the same was done in the discharge of his official duties and in bona fide obedience to the orders of his superiors. The servant of the state could not be made responsible before any court, whether judicial or administrative, for the performance of any act of State. He was also protected from the penal consequences of any interference with the personal liberty of fellow-citizens when the act complained of was done under the orders of his superior. Moreover, without the permission of the Council of the State, he could not be prosecuted or otherwise proceeded against for any act done in relation to his official duties.

### **Comparison between Rule of Law and Administrative Law**

Prof. Dicey attempted a comparison between the rule of law and administrative law. He pointed out that administrative law of France was not opposed to English ideas current during the 16th and 17th centuries. In both the countries, the judges were subordinate to the executive. Judges were lions but lions under the throne. In other words, the courts had no control over the executive. They could not check or oppose any action of the State. Bacon attempted to prevent the judges from proceeding with any case in which the interests of the Crown were involved by means of the writ *De non Proceedendo Rege Inconsulto*. Regarding that writ, Bacon wrote thus to the King: "The writ is a means provided by the ancient law of England to bring any case that may concern your Majesty in profit or power from the ordinary Benches, to be tried and judged before the Chancellor of England by the ordinary and legal part of this power. And your Majesty knoweth your Chancellor, an instrument of monarchy, of immediate dependence on the King, and therefore likely to be a safe and tender guardian of the legal rights." If Bacon's idea had been accepted, that would have established the principle of administrative law in England, but that was not to be. He failed in his attempt. According to Gardiner, "The working of this writ, if Bacon had obtained his object, would have been to some extent, analogous to that provision which has been found in so many French constitutions, according to which no agent of the Government can be summoned before a tribunal for acts done in the exercise of his office, without a preliminary authorisation by the Council of State. The effect of the English writ being confined, would have been of less universal application, but the principle on which it rested would have been equally bad."

According to Dicey, administrative law cannot be compared

to anything in English law as regards its contents, but it resembles the English law as regards the method of its formation. Administrative law is judge-made law. It is based on case-law. The same can be said about the English law as well which has grown during the last many centuries as a result of the judgments given by the English judges from time to time.

Dicey pointed out that so far as administrative law was concerned with the status, privileges and duties of Government officials, there was nothing in the English law which could be compared with it. Administrative law in France was a class by itself and its relation with the ordinary law of the country was the same as the relation of equity in England with the ordinary law of the country. To quote Dicey, "Droit Administratif, in short, rests upon ideas absolutely foreign to English law : the one..... is that the relation of individuals to the State is governed by principles essentially different from those rules of private law which govern the rights of private persons towards their neighbours : the other is that questions as to the application of these principles do not lie within the jurisdiction of the ordinary courts. This essential difference renders the identification of Droit Administratif with any branch of English law an impossibility."

According to Hauriou, "Under every legal system, the right to proceed against a servant of the Government for wrongs done to individuals in his official capacity exists in some form or other ; the right corresponds to the instinctive impulse felt by every victim of legal wrong to seek compensation from the immediately visible wrong-doer. But on this point the laws of different countries obey utterly different tendencies. There are countries (such for example, as England or the United States) where every effort is made to shelter the liability of the State behind the personal responsibility of its servant. There are other countries where every effort is made to cover the responsibility of the servant of the State behind the liability of the State itself, to protect him against, and to save him from, the painful consequences of faults committed in the service of the State. The laws of centralised countries, and notably the law of France, are of this type. There you will find what is called the protection of officials."

### Suggested Readings

Dicey	: Law of the Constitution.
Howe	Studies in the Civil Law.
Jennings	The Law and the Constitution.
Paton	Jurisprudence.
Robson	Justice & Administrative Law.
Salmond	Jurisprudence.
Wade & Philips	: Constitutional Law.

## CHAPTER V

### ADMINISTRATION OF JUSTICE

#### Importance of Justice

According to Prof. Sidgwick, *"In determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realised in its judicial administration."* According to Lord Bryce, "There is no better test of the excellence of a government than the efficiency of its judicial system." According to George Washington, "Administration of justice is the firmest pillar of government. Law exists to bind together the community, it is sovereign and cannot be violated with impunity." Salmond and Pound have emphasized the importance of justice in their definitions of law. According to Salmond, "Law may be defined as the body of principles recognized and applied by the state in the administration of justice." According to Pound, "Law is the body of principles recognized or enforced by public and regular tribunals in the administration of justice." According to Blackstone, "Justice is not derived from the king as his free gift but he is the steward of the public to dispense it to whom it is due. He is not the spring but the reservoir from whence right and equity are conducted by a thousand channels to every individual."

The two most essential functions of a State are war and the administration of justice. No State can justify its existence if it fails to perform either of the two functions. According to Salmond, administration of justice implies "the maintenance of right within a political community by means of the physical force of the State." There may not be any necessity of the administration of justice in a Utopia but in the present materialistic world, it is impossible to live without the machinery of justice. According to Spinoza, "Those who persuade themselves that a multitude of men can be induced to live by the rule of reason are dreamers of dreams and of the golden age of poets." According to Bentham, "The administration of justice by the State must be regarded as a permanent and essential element of civilization and as a device that admits of no substitute." According to Jeremy Taylor, "A herd of wolves is quieter and more at one than so many men unless they all had one reason in them or have one power over them." According to Hobbes, without a common power to keep them all in awe, it is not possible for individuals to live in society. Without it, injustice is unchecked and triumphant. The life of the people is solitary, poor, nasty, brutish and short.

## Growth of Justice

The origin and growth of administration of justice is identical with the origin and growth of man. The social nature of man demanded that he must live in society. While doing so, men must have experienced a conflict of interests. That created the necessity of providing for the administration of justice.

To begin with, every individual had to help himself to punish the wrong-doer. Personal vengeance was allowed. The principle of tooth for tooth and eye for eye was followed. However, experience showed that it was not a satisfactory state of affairs and consequently the necessity of the sword of the State was felt to defend the interests of the weak and the infirm. It was under these circumstances that the courts of justice came into existence. Justice was administered by eldersmen who were persons of position and social status. Later on, the same function was taken over by the king who came to be regarded as the fountain of justice. It was realised and recognized that the violation of the law of the State was not a private wrong but a public wrong and it was the duty of the State to punish the wrong-doers. No individual could take the law into his own hands even if he was in the right.

Many theories of justice have been given from time to time. Reference may be made in this connection to the theories of Kant, Duguit, Stammler, Kohler, Ihering and Roscoe Pound. A critical examination of all those theories shows that there were certain shortcomings in them and that is why those were considered to be inadequate.

To question arises whether there is anything useful in the study of those theories of justice or not. Dr. Julius Stone gives three reasons why a study of those theories is useful. "First, a study of the theories of justice which, from time to time, from country to country, and from man to man, have seemed to meet human needs, is productive of much more than frustration and unbelief. It produces an awareness of the many facets of the search for justice. The law-maker, including the judicial law-maker, who has sincerely followed the strivings of his predecessors, understood what were their questions, and what their replies, and the limitations under which perforce their replies were given, may avoid many pitfalls. He will be more likely to recognise a problem of justice in the interstices of the law, and will not pretend (as has so often happened in the past) that the answer he gives to such interstitial problems is dictated by compulsions which exempt him from the responsibility of choice. Further, when he makes his choice, as often he must, on some extra-legal major premiss (articulate or not), he will do so in awareness of the many alternative premisses which were available. If personal choice cannot be avoided, at least it may thus be a choice among the best

alternatives offering, and not merely of what may casually lie to hand.

"Third, after having chosen, he will preserve a diffidence as to the correctness of his choice which will permit manifest errors to be more quickly detected and remedied as experience discloses them. To say this is, after all, but to reformulate that sense of superb humility, unrest and uncertainty, which has marked the approach to their task of some of the greatest common-law judges of these last generations. It was Holmes who told students of the law that 'certainty generally is illusion, and repose is not the destiny of man', and that the least they must seek was also the most they could attain, 'an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.' Moreover, there is no short cut to such benefits which study of the theories of justice can confer; nor is it possible to by-pass the problems to which they addressed themselves.

"The fact, therefore, that the stage reached seems still far from any hoped-for goal, and that the direct road ahead is unpromising, may be rather a warning of the inadequacy of the charts, than of their inaccuracy as far as they go. Perhaps the surveying of the relation of law to actual human behaviour and actual social conditions generally, is an essential concurrent inquiry in the search for justice. Perhaps we are back at Montesquieu's central thesis that goodness in law is not an innate quality of a rule, but a relation between the rule and the physical and social context in which it is prescribed. Perhaps, in Raymond Saleilles' words, 'if the solution which is drawn by a perfect logic from a principle of mathematical exactitude is in contradiction with the facts, the facts must always be decisive and not the syllogism. . . . . (We) must reverse the process: observe the facts and adapt them by reason to justice and the ideal, and not take our departure from reason, justice or the ideal, in order to draw from them the facts which ought to be. In short, the deductive method will never demonstrate what ought to be: and if its results are never certain to accord with what can be, that method can only become useless and dangerous, and create Utopias and systems in the air which sacrifice the living forces of science and practice to unattainable chimeras, instead of serving to organise and idealise what is and can be'." (Pp. 376-77, *The Province and Function of Law*).

### **Natural and Legal Justice**

Justice is of two kinds, natural or moral justice and legal justice. Natural justice is justice in deed and truth while legal justice is justice as actually declared and recognized by the civil law and enforced in the courts of law. Natural justice is perfect but legal justice is imperfect and limited by human wisdom and power as expressed through the State. According to Salmond, "Legal justice and natural justice represent intersecting circles,



Justice may be legal but not natural or natural but not legal or both legal and natural. For the law is necessarily incomplete in the sense that it does not seek to cover the whole sphere of natural or moral justice or duty ; and it is also necessarily to some extent imperfect and erroneous, recognizing and enforcing as justice what is not justice in deed and in truth and therefore creating rights and duties which are legal rights and duties only and not also natural rights and duties."

### **Natural Justice and Duties**

Natural justice is not what ideal justice ought to be. It is not an ideal which it must try to attain. This is due to the fact that even if a thing is morally right, it may not be desirable for the State to enforce the same, Even if it is considered desirable to enforce the same, it may not be possible to regulate it by rules and the same may have to be left to the discretion of the judges.

### **Natural Justice and positive morality**

Natural justice cannot be identified with the rules of positive morality which implies the rules of conduct approved by the public opinion of any community. These rules are maintained and enforced not by the civil law but by the force of public opinion. Positive morality is more or less an attempt by the community to enforce the rights of natural justice in the same way as legal justice is an attempt of the state to enforce justice through the medium of legislaure and the courts of law.

### **Public Justice**

Public justice is that which administered by the State through its own tribunals. Private justice is distinguished as justice between individuals. Public justice is a relation between the courts on the one hand and individuals on the other. Private justice is a relation between the individuals. X borrows money from Y and private justice demands that he should pay the same as promised. However, if he does not do so, Y has the right to go to a court of law to force X to pay the same. If Y does so, it is a case of public justice. It is to be observed that private justice is the end for which the courts exist and public justice is the instrument or means by which courts fulfil that end. Private persons are not allowed to take the law into their hands. Even if a wrong has been done to them, they must refrain from helping themselves. There is no place for force in private justice. That can be used only in the case of public justice. To quote Salmond, "It is public justice that carries sword and the scales and not private justice."

### **Civil and criminal proceedings**

Two kinds of proceedings can be initiated in the courts of justice. Those may be for the enforcement of a right or the punishment of a violation of a right. In the first case, they are called

civil proceedings and in the second case criminal proceedings. According to Salmond, "In a civil proceeding, the plaintiff claims right and the court secures it for him by putting pressure upon the defendant to that end, as when one claims payment of a debt that is due to him or the restoration of a property wrongly detained from him or payment of damages for injury done to him or seeks the prevention of a threatened injury by means of an injunction. In a criminal proceeding, on the other hand, the prosecutor claims no right but accuses the defender of wrong. He is not a claimant but an accuser. The court makes no attempt to constrain the defendant to perform any duty or to respect any right. It visits with a penalty for the duty already disregarded and for the right already violated as whether he is hanged for murder or imprisoned for theft."

In a civil proceeding, courts compel a person to do his duty. In the case of criminal proceedings, he is punished for having failed to perform his duty. In a civil proceeding, the plaintiff claims a right and the courts secure it for him. In a criminal proceeding, the prosecutor claims no right but merely accuses the other party. The object of criminal proceedings is retributive while in the case of civil proceedings it is remedial.

It is pointed out that proceedings under Chapter XII of the Code of Criminal Procedure do not aim at punishment but merely bind down a person to keep peace so that he may not violate the legal rights of others. There are also civil proceedings which aim at the punishment of a wrong. A person may be imprisoned for non-observance of an injunction issued by a civil court.

### **Public and Private Wrongs**

The distinction between criminal and civil proceedings is often identified with that between public and private wrongs. Very often, a public wrong is spoken of as an offence committed against the community at large and dealt with by proceedings to which the State is a party. A private wrong is committed by one individual against another private individual. It is generally remedied by a civil suit at the instance of the injured person. However, all public wrongs are not crimes. A refusal to pay taxes is an offence against the State but it is not a crime at all. The State can start merely civil proceedings for the realisation of the same. The breach of a contract with the State is on the same footing as the breach of a contract with a private individual. Only civil proceedings can be started against the party at fault. Likewise, all crimes are not public wrongs. Criminal trespass is a crime but not a public wrong. This offence does not concern the public at large and the private party is allowed to initiate proceedings on his own behalf. The distinction between public and private wrongs is not coincident with criminal and civil proceedings. It is a case of cross divisions only. The division between public and private wrongs depends upon the difference in the nature of the rights

infringed, whereas the division between criminal and civil wrongs depends on the difference in the nature of the *remedy* applied. Public wrongs are sometimes remedied through civil proceedings and likewise private wrongs are sometimes punished in the criminal courts. To quote Salmond, "Public rights are often enforced and private wrongs are often punished." Moreover, the same act may be both a civil wrong and a crime. A thief may be punished for the offence of theft and he may also be forced to restore the stolen property to the real owner. However, there are cases where the enforcement of a violated right is impossible, *e. g.*, murder or rape. Likewise, there can be cases where the wrong creates a general feeling of insecurity in the community although no real loss has been caused, *e.g.*, an attempt to robbery or dacoity. There are also cases where the enforcement of the right infringed alone is considered sufficient in the interests of public justice. In such cases, civil proceedings alone are allowed. Examples of such cases are non-payment of debt, the non-performance of a contract of sale, etc.

### Object of Criminal Justice

Salmond refers to four objects of criminal justice, *viz.*, deterrent, preventive, reformatory and retributive.

#### (1) Deterrent Punishment

As regards the *deterrent* aspect of criminal justice, it is considered to be the most important by Salmond. To quote him, "Punishment is before all things deterrent and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him." A similar view was expressed by Locke when he stated that the commission of every offence should be made "a bad bargain for the offender". According to this theory, the object of punishment is not only to prevent the wrong-doer from doing a wrong second time but also to make him an example to other persons who have criminal tendencies. To quote a judge, "I don't punish you for stealing the sheep but so that sheep may not be stolen." Thus, the aim of punishment is not revenge but terror. An exemplary punishment should be given to the criminal so that others may learn a lesson from him. According to Paton, "The deterrent theory emphasizes the necessity of protecting society, by so treating the prisoners that others will be deterred from breaking the law." According to Manu, the great Hindu law-giver, "Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have regarded punishment (*Danda*) as a source of righteousness." Again, "People are in check by punishment, for it is difficult to find a man who by nature sticks to the path of virtue and this world is enabled to afford sources of enjoyment through fear of punishment."

The deterrent theory was the basis of punishment in England

in mediæval times and consequently severe and inhuman punishments were inflicted even for minor offences. In India, the penalty of death or mutilation of limbs was imposed even for petty offences. The same was the case with Mohammedan law. The penal law of England up to the beginning of the 19th century was also based on this principle.

However, there is a lot of criticism of this theory in modern times. It is pointed out that the deterrent theory has proved ineffective in checking crime. Even when there is a provision for very severe punishments in the penal law of the country, people continue to commit crimes. In the time of Queen Elizabeth, the punishment for pick-pocketing was death but in spite of that, pick-pockets were seen busy in their work among the crowds which gathered to watch the execution of the condemned pick-pockets. It is pointed out that with the increase in the severity of punishment, crimes have also increased. Moreover, excessive harshness of punishment tends to defeat its own purpose by arousing the sympathy of the public towards those who are given cruel punishments. Deterrent punishment is likely to harden the criminal instead of creating in his mind the fear of law. Hardened criminals are not afraid of imprisonment. The fear of the unknown is very great. Punishment loses its horror when once the criminal is punished.

## **(2) Preventive Punishment**

Another object of punishment is preventive or disabling. The offenders are disabled from repeating the offences by such punishments as imprisonment, death, exile or forfeiture of office. By putting the criminal in jail, he is prevented from committing another crime. By dismissing a person from his office, he is deprived of the opportunity to commit a crime again. According to Paton, "The preventive theory concentrates on the prisoner but seeks to prevent him from offending again in the future. Death penalty and exile serve the same purpose of disabling the offender." Critics point out that preventive punishment has the undesirable effect of hardening the first offenders or juvenile offenders by putting them in the association of hardened criminals.

## **(3) Reformatory Punishment**

According to another theory, the object of punishment should be the reform of the criminal. Even if an offender commits a crime, he does not cease to be a human-being. He may have committed a crime under circumstances which might never occur again. The object of punishment should be to bring about the moral reform of the offender. He must be educated and taught some art and industry during the time of imprisonment so that he may be able to live a good life after his release from jail. While awarding punishment, the judge should study the character and age of the offender, his early breeding, his education and environ-

ment, the circumstances under which he committed the offence, the object with which he committed it and other factors. The object of doing so is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits the circumstances.

The advocates of the reformatory theory point out that by a sympathetic, tactful and loving treatment of the offenders, a revolutionary change can be brought about in their characters. Even the cruel hardened persons can be reformed and converted into helpful friends by good words and mild suggestions. Severe punishment can merely debase them. Man always kicks against pricks. Whipping will make him balk. Threat will result in resistance. Prison-hell may create the spirit of defiance of God and man. Hanging a criminal is merely an admission of the fact that human-beings have failed to reform the erring citizen. Corporal punishments like whipping and pillory destroy all finest sentiments and tenderness in man. Mild imprisonment with probation is the only mode of punishment approved by the advocates of reformatory punishment.

Reference may be made to the *views of Salmond* on reformatory punishment. According to him, if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must be turned into comfortable dwelling places. Moreover, there are many incorrigible offenders who are beyond the reach of reformatory influences and with whom crime is not a bad habit but an instinct and they must be left to their fate in despair. The theory of reformatory punishment alone is not sufficient and there should be a compromise between the deterrent theory and the reformatory theory and the deterrent theory must have the last word. The primary and essential end of criminal law is deterrence and not reformation. In the past, the deterrent theory alone was considered and crime alone was taken into consideration and not other circumstances. In modern times, there is a tendency to ignore or minimize the deterrent aspect of punishment. What is required is that the value of the deterrent element must be given its proper place. In most cases, criminals are sub-normal persons and that is largely due to the fact that the fear of law has its effect on the normal minds. To quote Salmond, "The deterrent motive should not be abandoned in favour of the reformatory altogether since the permanent influence of criminal law in this stern aspect contributes largely to the maintenance of the moral and social habits which shall prevent any but the abnormal from committing crime and also directly deter any but the sub-normal, apart from exceptional circumstances, from committing crimes."

Salmond also points out that although the acceptance of the reformatory theory alone is bound to lead to disastrous consequences, yet it should be extended to the treatment of others than the

very young and insane persons. He refers to two objections. In the first place, law is too rough an instrument to distinguish accurately between the normal and the sub-normal. Secondly, except in extreme cases of insanity, it is not clear that even in the case of abnormal persons, the deterrent effects of punishment are not effective and necessary. If a person is deficient in any way, that is hardly any ground for treating him leniently than others. Even in the case of abnormal persons, it is easier to deter them from crime by discipline than to reform them by lenient punishment. Under the circumstances, the deterrent aspect must not be ignored in criminal justice. To quote Salmond, "The reformatory element must not be overlooked but neither must it be allowed to assume undue prominence. To what extent it may be permitted in particular instances to overrule the requirements of a strictly deterrent theory is a question of time, place and circumstance. In the case of youthful criminals, the chances of effective reformation are greater than in that of adults and the rightful importance of the reformatory principle is therefore greater also. In orderly and law-abiding communities, concessions may be safely made in the interests of reformation which in more turbulent society would be fatal to the public welfare."

It is to be observed that in spite of the criticism of Salmond, a lot of emphasis is being put on the reformatory aspect of punishment in modern times. In progressive States, provision is made for the prevention of habitual offenders, Borstal, approved schools and the placing of young persons under the charge of approved persons and institutions. Provision is also made for a system of probation for the first offenders. However, the greatest objection to the individualised treatment of criminals is the amount of money that is required to be spent and our imperfect knowledge of criminal psychology.

#### **(4) Retributive Punishment**

In primitive society, punishment was mainly retributive. The person wronged was allowed to have his revenge against the wrongdoer. The principle of "an eye for an eye, a tooth for a tooth" was recognized and followed. According to Justice Holmes, "It is commonly known that the early forms of legal procedure were grounded in vengeance".

According to Salmond, retributive punishment gratifies the instinct of revenge or retaliation which exists not merely in the individual wronged but also in the society at large. In modern times, we have given up the idea of private revenge but the State has come forward to have the revenge in place of the private individual. It is pointed out that commission of a crime creates the emotion of anger and the instinct of retribution. There must be indignation in society against injustice and if such an instinct is lacking, there is something wrong with that society. Such instincts

and emotions should be encouraged and strengthened by their satisfaction. According to Salmond, the sentiment of retributive indignation is today deficient rather than excessive and requires stimulation rather than restraint.

According to another view, retributive punishment is an end in itself. Apart from all gain to society, the victim or the criminal, wrong should meet its reward in equivalent sufference. Such a view can be traced back to the ideas of blood-guilt and taboo requiring purification by expiation. Expiation means the suffering or punishment for an offence. "The murderer has expiated his crime on the gibbet." According to Salmond, "Crime is done away with, cancelled, blotted out or expiated by the suffering of its appointed penalty. To suffer punishment is to pay a debt due to the law that has been violated. *Guilt plus punishment is equal to innocence.*" According to Lilley, "The wrong whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. This is the first object of punishment—to make satisfaction to outraged law."

Critics of retributive theory point out that punishment in itself is not a remedy for the mischief committed by the offender. It merely aggravates the mischief. Punishment in itself is an evil and can be justified only on the ground that it is going to yield better results. Revenge is wild justice.

A perfect system of criminal justice cannot be based on any one theory of justice. Every theory has its own merits and every effort must be made to take the good points of all. The deterrent aspect of punishment cannot be ignored altogether. Likewise, the reformatory aspect must be given its due place. The personality of the offender is as important as his actions and we must not divorce his actions from his personality. The offender is not only a criminal to be punished but also a patient to be treated. Punishment must be in proportion to the gravity of the crime. It must be small for minor crimes and heavy for major crimes. The first offenders should be leniently treated. Special treatment should be given to the juvenile offenders. It must not be forgotten that motive for the crime is generally lacking in the case of children. They commit petty offences on account of bad company and bad neighbours. Their cases must be handled with imagination and sympathy. Special courts should be set up for the trial of children and those in charge of them must try to find out ways and means of reforming them and not punishing them. A criminal should be able to secure his release by showing improvement in his conduct in jail. He who behaves better should be given good diet, clothes and leisure and a part of his sentence should also be remitted. The object of this concession is to convince the offender that normal and free life is better than the life in jail. We should set up more of mental hospitals and reformatories in place of jails. Living conditions in jails should also be improved.

### Capital Punishment

There is a demand from various quarters that the penalty of death for murderers should be abolished. The people all over the world have taken keen interest in this matter. It is pointed out that the penalty of death is merely a survival of the law of retaliation, and it must not be allowed to continue in modern times. It is pointed out that judges are likely to make mistakes and there is every possibility of innocent persons being sent to the gallows. 'There is no such danger, if the penalty is one of imprisonment for some period. Great jurists like Beccaria and Bentham have advocated abolition of death penalty. According to Bentham, "By disusing the death penalty as a punishment, you will prevent it is a crime." The death penalty has actually been abolished in countries like Denmark, Holland, Belgium, Norway and Sweden. From the experience of these countries, it is pointed out that the situation has not gone worse there and the same can be expected if death penalty is abolished in other countries. Experience shows that although death penalty has been in existence for centuries, the number of murders has not gone down. Those who commit murders, do not care for the consequences. Murders are committed due to certain circumstances, and it is desirable that instead of hanging the people, an attempt may be made to reform them and also remove the circumstances which were responsible for their acts.

According to Dr. Edward Green, "The design of the penal codes currently in force in the various states of the United States was inspired by the classical school of criminal jurisprudence stemming from the Enlightenment of the eighteenth century. Conceived as a protest against the excesses of physical cruelty wreaked upon convicted criminals in the name of expiation or retribution, the classical jurisprudence repudiated vengeance as a proper aim of criminal justice and affirmed that the sole justification of punishment is the deterrence of crime. This objective was to be accomplished by striking a proportion between the evil of the crime and its penalty such that the pain of the punishment would outweigh the pleasure to be had from the offence. This theme was elaborated in minute detail by the architects of the classical theory of punishment, among them Jeremy Bentham, whose rules of 'moral arithmetic' attempted to impart to the criminal law the quality of a rational science. Nevertheless, Bentham recognized that the punishment for the same offence might properly vary according to circumstances.

"The major opposition to the classical theory of punishment stems from the positive school of criminology, a product of nineteenth century social science. The positivists, rejecting the hedonistic psychology of the classicists, postulate that the causes of criminal behaviour lie in antecedents which can be studied by scientific methods and urge that the knowledge thereby acquired



should be the basis of programmes for the scientific control of crime. They attack the objectives of punishment—whether expiation, retribution, or deterrence—on the ground that such ends are either unworthy of a civilized society or of limited efficacy. They call for a programme of individualized treatment designed to rehabilitate the offender or, if he is incorrigible, to isolate him indefinitely. Some positivists doubt that the judge's formal training qualifies him to arrive at a just sentence; they would limit the role of the judge to refereeing the trial and transfer the sentencing function to a panel of experts trained in the sciences of human behaviour. A more moderate proposal recommends the establishment of sentencing boards to act merely in an advisory capacity to the judge.

"The present-day condition of juridical thought in the United States shows some effects of the vigorous attack of the positivists. With the acceptance of the view that environmental pressures or disordered states of mind might impede the offender's ability to calculate rationally the risks of pleasure and pain involved in criminal conduct, the judiciary came to recognize varying degrees of guilt for the same offence. This modified view, or neo-classical school, is the foundation of the present-day system of Anglo-American criminal jurisprudence. Although acknowledging the values of reform and rehabilitation, it places the protection of society above them and continues to assert the deterrent value of punishment to achieve that end. This is the position taken by the framers of the American Law Institute's Model Penal Code and supported by a probably decisive majority of the American judiciary. In this view, the objective sought by the judge need not be the same in all cases. As judge William J. Campbell, an American Federal Court judge, has pointed out, where rehabilitation is the prime concern, the treatment should be tailored to the individual; in extreme cases of antisocial offenders, prolonged confinement assures the protection of society. Where, however, the law violation is a matter of principle, such as draft violation, and where '.....there is no question of rehabilitation.....they (offenders) must be sentenced as examples; otherwise, human nature being what it is, we would most assuredly be faced with great numbers of less stable citizens seeking ways and means to avoid military service.' Even retribution is allowed as an objective of sentencing where the crime is '.....revolting and incomprehensible to the group'." (Pp. 2-3, *Judicial Attitudes in Sentencing*).

### **Primary and Sanctioning Rights**

The rights enforced by a State are of two kinds: primary and sanctioning rights. According to Salmond, a sanctioning right is one which arises out of the violation of another right. All other rights are primary rights. For example, my right to reputation and not to be libelled is a primary right. If that right of mine is

violated, I have a sanctioning right to monetary compensation. I have a primary right to the fulfilment of a contract entered into by me and my right to damages in the case of a breach of the contract is a sanctioning right.

Sanctioning rights may be divided into two parts with reference to the purpose of law in creating them. Those rights may be the right to exact and receive a pecuniary penalty or the right to exact and receive damages or other pecuniary compensation. The first kind of the sanctioning rights is common in England in modern times. However, in some cases law creates and enforces a sanctioning right which has in it no element of compensation to the person injured but is appointed solely as a punishment for the wrong-doer. To take one example, a law may make provision for a pecuniary penalty payable to a common informer. The second kind of sanctioning right to damages or pecuniary compensation is a very common one. Whenever a primary right is violated, the injured party has the right to compensation. That compensation may be in the form of penal redress or restitution. In the case of penal redress, law compels the wrong-doer to pay to the plaintiff the loss incurred by him and that may be more than the profit made by the wrong-doer. From the point of view of the plaintiff, the money received by him is merely a compensation and nothing else. From the point of view of the defendant, it is a penalty imposed upon him for his wrong-doing. If I burn the house of my neighbour through negligence, I have to pay compensation to the neighbour. In this way, my neighbour is compensated and he can have another house. So far as I am concerned, it is a kind of penalty imposed on me for my negligence. In the case of restitution, the defendant is compelled to give up the pecuniary benefit received by him at the cost of the plaintiff. For example, if a person detains the goods of another person without any lawful justification, he can be compelled to pay the price of those goods.

According to Gray, as all rights with which civil law is concerned are those it creates and therefore dependent on judicial enforcement, the only rights, other than specific enforcement, which can exist for civil law are those classified as sanctioning rights. For example, if a contract is not specifically enforced, all that the law recognizes and enforces is damages for its breach and therefore the only legal right which exists is a right to damages if and when actual breach occurs. The doctrine of anticipatory breach of contract is criticised on the ground that until actual breach occurs, no right of action arises. It is also pointed out that the courts are not concerned with the abstract right that a thing should be done by a party unless specific purpose is involved, but with the right of the other party to a specific remedy. A distinction between primary and sanctioning rights seems justified from the practical point of view but in accordance with Salmond's

strict theory, the primary rights are not legal rights at all but merely rights of positive morality. The courts enforce not the primary rights but the sanctioning rights.

Reference may be made to some exceptional rights, *e.g.*, the right to distrain for rent or for rent charges, the right to eject trespassers using no unreasonable force, the right to distrain on cattle found trespassing not under the immediate control of anyone, etc. Another kind of exceptional sanctioning right consists of the injunctions forbidding the anticipated violation of a primary right. These are exceptional in the sense that a decree is made against persons who have as yet committed no wrong at all.

### **Penal and Remedial Proceedings**

All legal proceedings can be divided into five categories, *viz.*, actions for specific enforcement, actions for restitution, actions for penal redress, penal actions and criminal prosecutions. Actions for penal redress, penal actions and criminal prosecutions are called penal proceedings because their ultimate purpose is punishment. Actions for specific enforcement and actions for restitution are called remedial proceedings as their object is to remedy a wrong. In the case of penal proceedings, the ultimate purpose of law is on the whole or in part the punishment of the defendant. This is so where a person is imprisoned or held liable in damages to the person injured by him. In the case of remedial proceedings, the idea of punishment is entirely absent. From the point of view of legal theory, the distinction between penal and remedial proceedings is very important. It is to be noted that all criminal proceedings are penal although the converse is not true. Some civil proceedings are also penal while others are of a remedial nature.

### **Secondary Functions of the Courts of Law**

The primary function of a court of law is the administration of justice. It has to enforce rights and punish wrongs. In every case, there are two parties, *viz.*, the plaintiff and the defendant or the prosecutor and the accused. However, in addition to this, other functions are performed by the courts of law.

Courts adjudicate on the claims of citizens against the State. It seems logically impossible to conceive of the forces of the State being used against itself. However, the laws of all modern States provide remedies for individual citizens against the State to be pursued in its own courts. In the case of India, a suit can be brought against the Union of India or the government of a state. In the case of England, no action could be brought against the Crown up to the passing of the Crown Proceedings Act in 1947. However, even then, in the case of contractual liabilities, a British subject could put in a petition of right which was governed by the Petition of Rights Act of 1860. A petition of right could be made also for the recovery of real property, chattel or damages for a breach of contract. If a petition of right was refused, there was

no appeal against that. However, the petition was always granted unless the same was frivolous or did not disclose any cause of action at all. A judgment in favour of a petitioner at a petition of right was in the form of a declaration of the rights of the petitioner and was as effective as a judgment in an ordinary action. The Act of 1947 provides that whereas a person has a claim against the Crown, that claim can be enforced.

Another function of the courts is the declaration of the rights of individuals. This is done where the rights of the parties are uncertain. What a court does is that it gives an authoritative declaration of the rights of the parties concerned. Examples of declarative proceedings are the declarations of legitimacy, declarations of nullity of marriage, advice to trustees or executors regarding their legal powers and duties, authoritative interpretation of wills, etc.

In certain cases, the courts of justice undertake the management and distribution of property of the deceased person and also of minors whose property is put under the Court of Wards. Other examples of administrative functions are the administration of a trust, the realization and distribution of insolvent estate, liquidation of a company by the court, etc.

In certain cases, judicial decrees are employed as the means of creating, extinguishing and transferring rights. Examples of such functions are a decree of divorce or judicial separation, adjudication of bankruptcy, a decree of foreclosure against a mortgagor, appointment or removal of trustees, grant of letters of administration, etc. In such cases, the judgments of courts operate not as the remedy of a wrong but as a title of right.

### **Suggested Readings**

- |                |                                  |
|----------------|----------------------------------|
| Beccaria       | : Crimes and Punishment.         |
| Cahn           | : The Sense of Injustice.        |
| Ewing          | : The Morality of Punishment.    |
| Kenny          | : Outlines of Criminal Law.      |
| Margaret       | : The Crime of Punishment.       |
| Paton          | : Jurisprudence.                 |
| Pieper, Joseph | : Justice.                       |
| Pollock        | : A First Book of Jurisprudence. |
| Russell        | : On Crime.                      |
| Williams, G.L. | : Criminal Law.                  |

## CHAPTER VI

### THE STATE

#### Definition of State

Many definitions of state have been given by various writers. According to Sidgwick, the state is a "political society or community, *i. e.*, a body of human beings deriving its corporate unity from the fact that its members acknowledge permanent obedience to the same government which represents the society in any transactions that it may carry on as a body with other political bodies." According to Phillimore, the state is "a people permanently occupying a fixed territory, bound together by common laws, habits and customs into one body politic exercising through the medium of an organised government independent sovereignty and control over all persons or things within its boundary, capable of making war and peace and of entering into international relations with the communities of the globe." According to Holland, the state is "the numerous assemblage of human-beings, generally occupying a certain territory, amongst whom the will of the majority or of an ascertainable class of persons, is by the strength of such a majority or class, made to prevail against any of their number who oppose it." According to Willoughby, the state exists "where there can be discovered in any community of persons a supreme authority exercising control over the social actions of individuals and groups of individuals and itself subject to no such regulation." According to Bluntschli, "The state is a combination or association of persons in the form of government and governed on a definite territory, united together into a moral organization masculine personality or more shortly, the state is the politically organized national person of a definite country." According to Garner, "The state is a community of persons more or less numerous, permanently occupying a definite portion of territory, independent or nearly so of external control and possessing an organized government to which the great body of inhabitants render habitual obedience."

According to Austin, "The state is usually synonymous with the sovereign. It denotes this individual person or the body of individual persons which bears the supreme powers in an independent political society." According to Salmond, "A state or political society is an association of human-beings established for the attainment of certain ends." According to Bentham, "When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and

governors) are said to be in a state of political society." According to Oppenheim, "A state proper in contradistinction to colonies and dominions is in existence when a people is settled in a country under its own sovereign government." The judges of the Supreme Courts of the U. S. A. define the state thus : "The state describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; it often denotes only the country or territorial region inhabited by such community; it is also applied to government under which the people lived; at other times, it represents the combined idea of people, territory and government. In all these senses, the primary conception is that of a people or community." Again, the state is "a body of free persons, united together for common benefit to enjoy peaceably what is their own and to do justice to others." According to T. H. Green, "The state is the whole body for whose well-being the organized society exists, *i. e.*, the community. The state is the entire governmental apparatus of which the sovereign, the law-maker, is the institution." According to Edward Jenks, the state is the whole governmental system.

### Elements of the State

(1) Reference may be made to the essential elements of the state. The first essential element is *population*. There can be no state without a people. According to Oppenheim, "The people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds or be of different colours." No fixed principle is essential to constitute a state. The population of a state may be very large or very small.

(2) Another essential element of the state is that it must have *territory*. The wandering people cannot constitute a state. It is only when they settle down on some definite territory that they constitute a state. The size of the territory of a state is not very material. It may be large or small and we have both kinds of states. However, Salmond and Kelson do not regard territory as an essential element of the state. To quote Salmond, "The territory of a state is that portion of the earth's surface which is in its exclusive possession and control. It is that region throughout which the state makes its will permanently supreme and from which it permanently excludes an alien interference. This exclusive possession of a defined territory is a characteristic feature of all civilized and normal states. It is found to be a necessary condition of the efficient exercise of governmental functions." But *we cannot say it is essential to the existence of a state*. The state without a fixed territory—a nomadic tribe for example—is perfectly possible. A non-territorial society may be organized for the fulfilment of the essential functions of government, and if so, it will be a true state. Such a position of things is, however, so rare and unimportant that

it is permissible to disregard it as abnormal. It is with the territorial state that we are alone concerned and with reference to it we may accordingly define a state as a society of men established for the maintenance of peace and justice within a determined territory by way of force."

(3) Another essential element of the state is *Government*. It is the machinery through which the administration of a country is carried on. The government is the outward manifestation of a state. It is an organ of the community. There can be no state without a permanent and definite organization. A temporary and casual union of individuals does not constitute a state. According to Salmond, "Political or civil power is the power vested in any person or body of persons of exercising any function of the state by his or their decision to set in motion the forces of the state for a particular purpose. All the persons with such power considered together constitute the government of that state and are the persons through whom the state as a whole acts." The government is divisible into three great departments, *viz.*, the legislature, the executive and the judiciary.

(4) Another essential element of the state is *sovereignty*. According to Salmond, "Sovereign or supreme power is that which is absolute and uncontrolled within its own sphere." It is this element of sovereignty which distinguishes the state from government. The sovereign is supreme both externally and internally. There is no power which is above it. According to Austin, "If a determinate human superior not in the habit of obedience to a like superior receives habitual obedience from the bulk of a given society, that determinate human superior is the sovereign in that society and the society including the superior, is a society, political and independent." The sovereign power is unlimited, illimitable, indivisible, inalienable and imprescriptible.

### **Primary or Essential Functions of the State**

Salmond divides the functions of the state into two parts: primary or essential functions and secondary functions. As regards its primary functions, those are war and the administration of justice. The fundamental purpose and end of political society is defence against external enemy and the maintenance of law and order within the country. A study of the various writers shows that these two functions have been considered to be essential although there are other functions which are deemed to be desirable. To quote Herbert Spencer, "The primary function of the state or of that agency in which the powers of the state are centralised, is the function of directing the combined actions of the incorporated individuals in war. The first duty of the ruling agency is national defence. What we may consider as measures to maintain inter-tribal justice are more imperative and come earlier than measures to maintain justice

among individuals. Once established, the secondary function of the state goes on developing and becomes a function next in importance to the function of protecting against external enemies. With the progress of civilization, the administration of justice continues to extend and becomes more efficient. Between these essential functions and all other functions, there is a division which, though it cannot in all cases be drawn with precision, is yet broadly marked."

The primary functions of war and administration of justice are essentially the same and they help individuals to maintain their rights in society. However, there are certain differences in the two functions. The administration of justice requires the inter-position of a judicial decision but in the case of war, the state acts extra-judicially without awaiting any such decision. Judicial force is usually regulated by law but extra-judicial force recognizes no law. It is the will of those who exercise it. There is no law in war. Martial law is merely the will of the commanding officer. Another distinction is that judicial force is commonly exercised against private persons but extra-judicial force is exercised against states. However, it is possible that the state may wage war against its own subjects or against pirates or other persons who do not constitute a political society. Another difference is that the machinery of justice is usually employed against internal but force is used against external enemies. The administration of justice is usually against the persons completely in the power of the state and its force is usually latent. Extra-judicial justice is not armed with such obviously overwhelming force.

### **Membership of the State**

While referring to the membership of the state, we mention citizens and residents although formerly reference was made to denizens, peregrini, latins, etc. Citizenship is a legal relation which persists until the same is terminated by some special act. A resident merely lives in a state and his temporary residence connects him with the state. Both the citizens and residents are subject to the authority of the state and entitled to its protection. However, citizens are entitled to more rights than the residents. Both citizens and residents enjoy the protection of law while living within a state. However, citizens enjoy the same protection even if they go abroad. Moreover, they are subject to the laws of their country even if they go outside their country. The importance of citizenship is diminishing and there is a general tendency to minimize the difference between citizens and residents. Many facilities are given to residents to acquire citizenship.

Ordinarily, the terms citizen and subject are used one for the other. Their relationship to the state is personal and permanent and not merely territorial and temporary. However,



there is a difference between the two terms. The term subject is commonly limited to monarchical forms of government and the term citizen is specially applied to republics. For example, a British subject can become a citizen of the U. S. A. or France by naturalization. The term citizen emphasises the rights and privileges of status but the case is otherwise with subjects. The term subject can be used in a wider sense in which it includes all members of the body politic whether they are citizens or resident aliens. They are all subject to the authority of the state and owe to it obedience and fidelity. It is rightly pointed out that "every alien coming into a British colony becomes temporarily a subject of the Crown—bound by, subject to, and entitled to the benefit of the laws which affect all British subjects." It is also stated in another connection that "though the statute speaks of the king's subjects, it extends to aliens, for though they are not the king's natural born subjects, they are the king's subjects when in England by a local allegiance."

A distinction may be made between *citizenship and nationality* although the two terms are used one for the other. Citizenship implies the full membership of a particular state and nationality implies the membership of a community which may be wider than a state based on common race, common speech, etc. However, there is a tendency for every nation to consolidate itself into one state. The slogan is: one nationality, one state. British nationality can be acquired by birth in a British dominion, by descent from a father born in a British dominion or naturalized as a British subject, by the marriage of an alien woman to a British subject, by naturalization, and by continued residence in a territory after the same has been conquered or otherwise acquired by the British Crown.

### **Independent and Dependent States**

According to Salmond, states are of two kinds, independent and dependent. An independent state is a sovereign state. It has a separate existence of its own and is not a part of a larger whole. A dependent state is not a sovereign state. It is not complete and self-existent. France and the U. S. A. are independent states but the states forming parts of the U. S. A. are not independent states. However, there are some writers who maintain that a state which is not an independent state, is not a state at all. But according to Salmond, so long as an organized community performs the essential functions of a state, there is absolutely no justification for denying to it the title of the state. So long as it can perform those functions, it is a state. Before the World War I, international law took into account only the independent states, but the things have changed now.

### **Unitary and Composite States**

A unitary state is one which is not made of territorial divisions which are states themselves. A composite state is one

which is itself an aggregate or group of constituent states. Salmond classifies composite states as imperial, federal or confederate according to whether in legal theory there exists a central government from which the authority of all others is derived.

According to Nathtan, a federation is "an aggregate of small states which, while retaining each its separate identity, are united together for defined common purposes in a union which, theoretically at least, is indissoluble." According to Dicey, a federal state is a "political contrivance intended to reconcile national unity with the maintenance of state rights." According to Prof. MacIver, the distinctive feature of a federation "is the formal division of sovereign powers between the constituent or part states and the larger state which they together compose." According to Roscoe Pound, "A federal polity is necessarily a legal polity. Only a constitution which has the supreme law of the land can hold the whole and parts in their appointed spheres. Also it is a polity requiring a separation or distribution of powers, since concentration of all governmental powers anywhere not merely threatens the regime of balance, it cuts off means of preserving the balance when it is disturbed. While a constitution has a purely political side, as setting up a frame of government, it must be, especially in a federal polity, a legal document, a body of authoritative precepts, rules, principles and standards enforceable and enforced as the supreme law."

### **Federation and Confederation**

There is a fundamental difference between a federation and confederation. According to Hall, "A confederation is a union strictly of independent states which consent to forego permanently a part of their liberty of action for certain specific objects, and they are not so combined under a common government that the latter appears to their exclusion as the international entity." In a federation, the units are merged into the federal government and a new state is created from the legal point of view. A federation is a permanent form of union and the units cannot leave the same. According to Garner, the component members of a confederation "are free to withdraw at will and thus dissolve the confederation, and the confederating authorities have no constitutional power to restrain a dis-affected member and compel it to remain in the confederation against its will." A confederation is a temporary union for a temporary purpose and when that is achieved the confederation is dissolved. However, a federation is a permanent union for an indefinite period.

### **Federal and Unitary Constitutions**

In a federal constitution, there is a division of powers between the federal government and the units and each is supreme in its own sphere. If a law is passed by a part on a subject which is not within its jurisdiction, it can be declared *ultra vires* by the

courts. In the case of a unitary constitution, all the powers are in the hands of the Central Government. There is no division of powers. All powers can be exercised by the central legislature or the central executive. The courts do not possess the power to determine the constitutionality or otherwise of a law passed by a legislature. In a federation, the constitution is supreme. In a unitary government, the legislature is supreme.

It is to be observed that there is a strong desire on the part of the union to maintain their separate entity in a federal system. The units are not prepared to merge themselves. The sentiment of union without unity is absolutely essential for the success of a federal system. In a unitary system, units lose their separate existence and the central government becomes all in all. Moreover, a unitary government works successfully among those persons who are homogenous. On the other hand, a federal government works successfully among those people where the residents of different localities have varying interests. Every federal constitution must be both written and rigid but that is not essential in a unitary constitution.

### **Conditions necessary for Federation**

According to Prof. Dicey, two things must be present for the formation of a federation. There must be a strong desire to have a union. The will to have a union is the basis of federation. The component units of a federation must be inspired and bound together by common ties of national affinity and sentiment. There must be a community of political, economic and agricultural interests. The areas desiring to federate should be geographically contiguous. They must not be separated from one another by distant spaces of land or water. Distances lead to carelessness or callousness on the part of both central and local governments. National unity is difficult to attain where the people are too far apart. "The aim of federalism is to produce a unified nation, and complete unity demands that the boundaries of states and nationality coincide."

Another essential is the community of language, religion, culture, customs, historical traditions, etc. All these factors are helpful in cementing the bonds of national unity.

The federating units should be inspired and bound together by the sentiment of unity which is the index of a common national mind. Separate tendencies must disappear and the people must think in terms of a new state and one nation.

It is also desirable that there should be "rough equality" among the units. States larger in size and population and more powerful in resources "than the others may be too proud and domineering for smaller ones." In the case of the German Empire set up in 1871, the population of Prussia was three-

fourths and its area was two-thirds of the total area of Germany. No wonder, the federation failed.

"Federal government requires a basis of political competence and general education among the people." A federal constitution can work successfully only when the people are educated and politically advanced. This is due to the fact that there is dual polity in a federal system and the people are required to care not only for their own states but also for the federal government.

### **Leading Characteristics of a Federal State**

Every federal state must have three characteristics. The constitution must be supreme. This is due to the fact that a federal constitution is on a contractual basis. The supremacy of the constitution involves three consequences. A federal constitution must be a written constitution. It must also be a rigid constitution. Every legislative body under a federal constitution must be a subordinate law-making body as its laws must be subordinate to the law as laid down in the constitution itself.

Another characteristic of a federal state is the division of powers between the federation and the units. It is in this respect that a federal constitution differs from a unitary constitution. The general principle regarding the division of powers is that subjects which are concerned with the country as a whole are given to the federal government and those which are of local importance are given to the units. Thus, the departments of defence, foreign affairs, means of communications and transport, currency, etc., are given to the federal government. Other subjects which concern the particular units are given to the units. It is to be observed that in the case of the U. S. A., the residuary powers are with the states but certain specific powers have been given to the federal government. The same is the case in Australia. The result is that the units in the U. S. A. and Australia are strong. On the other hand, the residuary powers in Canada are with the federal government. Even the Minister of Justice has been given the power to disallow any law passed by the provincial legislature.

Another leading characteristic of a federal constitution is the federal judiciary which is made the guardian of the constitution. In the case of the U. S. A., it is the duty of the Supreme Court to see that neither the units nor the federal government passes any law which is not within the sphere of its jurisdiction. To quote, "The Bench, therefore, can and must determine the limits to the authority both of the government and the legislature; its decision is without appeal, the consequence follows that the bench of judges is not only the guardian but also at a given moment the master of the constitution."

### **Advantages of a Federal Constitution**

Federation is considered to be a panacea for many economic and political ills from which the world is suffering today. There is a movement for a world federal government and it is contended that the only hope of the world lies in a federal system of government. A federal constitution enables a large number of small states to form a new state which comes to have strength and prestige. Without a federal constitution their existence might be precarious. Federalism gives dignity to the federating states. "To be a member of a great nation like the United States is more dignified than to continue to be a citizen of an independent State of Virginia or Texas. A federal system does not sacrifice the individuality of the federating states. It harmonizes local autonomy with national unity and provides an equilibrium between the centripetal and centrifugal forces. Under a federal system, diversities are recognized and full opportunity is given for their growth and development.

The federal government is given only those functions which are considered to be essential for the national life of the country. Subjects of local importance are left into the hands of the local units. A federal system prevents the rise of despotism.

A federal system allows experiments in local legislation and administration which may be fatal in a unitary government. Such a system of administration stimulates interest in public activity and inculcates a civic sense. The division of powers is conducive to efficiency in administration.

The federal system is economical. The duplication of political institutions can be avoided. Instead of all the 50 States of the U. S. A. having their separate armies, ambassadors, etc., it is desirable to have only one. In this way, a lot of money which is otherwise spent on duplication, is saved.

In international affairs, a federation enables a strong, united and consistent foreign policy to be followed which is not possible if each unit is independent.

### **Disadvantages**

There are many disadvantages of a federal system of government. Federation means a double system of government and division of authority between the units and the federal centre means weakness and inefficiency in administration. There is duplication of administration and diversity of legislation even in those matters which require uniformity.

A federation necessitates a written and rigid constitution. It compartmentalizes the life of a nation. It may not be adaptable to the changing conditions. Legislation in various units may create unnecessary hurdles in the way of national progress. "The proper adjustment of central to local governments thus

becomes a constant source of difficulty and the danger of rebellion or the formation of sectional factions is always present."

A federal system shows inherent weakness and inconsistency in the conduct of foreign affairs. "The experience of the United States in particular has shown that the individual members of the federal union, by virtue of their reserved powers over the rights of person and property, may embarrass the national government in enforcing its treaty obligations in respect to aliens residing in the United States."

There is also the danger of secession. Secession is easier in a federal state than in a unitary state.

According to Lord Bryce, a federal system suffers from weakness in the conduct of foreign affairs, weakness in home government on account of deficient control of central government over the units and their citizens, danger of secession or rebellion of units, formation of groups or factions among the units, lack of uniformity in legislation and administration and trouble, expense and delay due to the complexity of a double system of legislation and administration.

According to Prof. Munro, "America demonstrated to the world that federalism did not necessarily mean weak government, but that it was quite reconcilable with a strong national administration.....It has demonstrated the potential strength of a federal Republic both in foreign and domestic policy."

### **The State and Law**

There are three theories with regard to the relationship between state and law. According to the first theory, state is the creator of law. To quote Salmond, "It is in and through the state alone that law exists." According to Austin, "Every positive law obtaining in any community is a creation of the sovereign or the state." According to Taylor, "Not until after the state is formed can there be law in the proper sense of the term." According to Hobbes, "None can make law but the commonwealth" which means the state.

According to the second view, law is the creator of the state. According to Dr. Jennings, "It is not the state which creates the law nor the law which creates the state; they arise simultaneously by the act of foundation." According to Laski, "The rule of law is, clearly, independent of the state and is, indeed, anterior to it." According to Miller, "Law, like language, springs from the society itself and one of its first works is the creation of the state—the greatest of corporations—for the enforcement of rights and duties in accordance with law. The state makes laws but does not create chemical relations." Similar views have been given by Krabbe and Duguit.

According to the third view, law and state are one and the

same thing. They merely indicate legal order. Kelsen is one of the advocates of this view. However, Miller criticizes him in these words: "The identification of law with the state is like the identification of church and state or religion and the state."

### **Suggested Readings**

Willoughby : Nature of the State.

Wilson : The State.

## CHAPTER VII

### SOURCES OF LAW

The term "Sources of Law" has been used in different senses by different writers and various views have been expressed from time to time. Sometimes, the term is used in the sense of the sovereign or the state from which law derives its force or validity. Sometimes, it is used to denote the causes of law or the matter of which law is composed. It is also used to point out the origin or the beginning which gave rise to the stream of law. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as the name for an historical fact out of which the rules of conduct rise into existence and acquire legal force. Some have used the term as the sources of knowledge of law.

(1) According to the *school of natural law*, law has a divine origin. Every law is the gift of God and the decision of sages. The Quran is the word of God. The Hadis contain the precepts of the Prophet as inspired and suggested by God. According to the Hindus, the Vedas were inspired by God. The law of Lycurgus in Greece had a divine origin. The Moses got the Commandments from Jehovah and Hammurabi got his code from the Sun-God. To quote Vinogradoff, "Looking back on the historical evolution of jurisprudence, we may discern three stages ; the first stage of thought is dominated by the idea of Providence.... All societies place in the centre of their conception of the human world the idea of the guidance of the Providence. As man is directed by God's supreme power, this power must account for the fundamental rules of conduct in morality and in law".

(2) The *sociological school of law* protests against the orthodox conception of law according to which law emanates from a single authority in the state. According to this school law is taken from many sources and not from one source. According to Ehrlich, "At the present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science, nor in judicial decisions, but in society itself". According to Duguit, law is not derived from any single source and the basis of law is public service. There need not be any specific authority in a society which has the power of making laws".

(3) According to **Keeton**, the term "sources of law" implies the material out of which law is eventually fashioned through the activities of judges. He refers to the binding sources of law and



persuasive sources of law. As regards the binding sources of law, they restrict the activities of judges and are to be found in customary law, legislation and judicial precedents. The persuasive sources are those sources which can only be of importance in judicial decisions in default of binding sources or which have at some previous time influenced the formation of a binding source of law. Examples of persuasive sources of law are the professional opinions and the principles of morality or equity.

(4) **Austin**<sup>1</sup> refers to three different meanings of the term "sources of law". In the first place, the term refers to the immediate or direct author of the law which means the sovereign in the country. Secondly, the term refers to the historical documents from which the body of law can be known. In this connection, reference can be made to the Digest and Code of Justinian. In the third place, the term refers to the causes which have brought into existence the rules which later on acquire the force of law. Examples are customs, judicial decisions, equity, legislation, etc.

(5) The analytical school of jurisprudence as represented by Austin is attacked by the historical school as represented by persons like Savigny, Sir Henry Maine, Puchta, etc. According to their view, law is not made but is found. The foundation of law lies in the common consciousness of the people which manifests itself in the practices, usages and customs of the people. Customs and usages are the sources of law.

(6) Salmond refers to the formal and material sources of law. A *formal source* is that from which a rule of law derives its force and validity. It is that from which the authority of law proceeds. The *material sources* of law are those from which is derived the matter and not the validity of law. The material source supplies the substance to which the formal source gives the force and nature of the law. The formal source of whole body of civil law is the will and power of the state as manifested in the courts of justice. Whatever rules have the sanction and authority of the

1. According to Austin, "In one of its senses, the source of a law is its direct or immediate author. For either directly or remotely, the sovereign, or supreme legislator, is the author of all law ; and all laws are derived from the same source ; but immediately and directly laws have different authors. As proceeding from immediate authors of different characters or descriptions, laws are talked of (in the language of metaphor) as if they arose and flowed from different fountains or sources : in other words, the immediate author of a given rule (whether that author be the sovereign or any individual or body legislating in subordination to the sovereign) is styled the fountain, or the source, from which the rule in question springs and streams. But this talk is rather fanciful than just ; for, applying the metaphor with the consistency which even poetry requires, rules established immediately by the supreme legislature are the only rules springing from a *fons* or *source*. Individuals or bodies legislating in subordination to the sovereign are more properly reservoirs fed from the source of all law, the supreme legislature, and again emitting the borrowed waters which they receive from that Fountain of Law."

courts of justice have thereby the force of law. In such force, no other rules whatever have any share. The matter of the law may be taken from many sources but it is the courts of country which give them legal validity. The material source of customary law is the usages of the people but its formal source is the will of the state in the same way as in the case of statutory law.

### Legal and Historical Sources

According to Salmond, the material sources of law can be divided into two parts: legal and historical. Legal sources of law are those sources which are recognized as such by law itself. Historical sources of law are those sources which are such in fact but are nevertheless destitute of legal recognition. In respect of its material origin, a rule of law has often a long history. Its immediate source may be a decision by a court of law. But that court may have drawn the matter of its decision from the writing of some lawyer, *e.g.*, Pothier. Pothier himself may have taken the material from Justinian who himself may have taken the material from the edict of an urban praetor. In such a case, the decision, the works of Pothier, the code of Justinian and the edict of the urban praetor are the material sources of the rule of law. However, there is a difference between them as a precedent is a legal source of law and others are merely the historical sources. The precedent has its source not merely in fact but also in law. The others are its sources in fact and not in law.

The legal sources of law are authoritative but the historical sources of law are not authoritative. The legal sources are allowed by the law courts as a matter of right. The historical sources cannot put forward such a claim. Although they influence the course of legal development, yet they do not speak with any authority. No rule of law demands their recognition. The statute book of England and the works of Bentham are the material sources of English law and the students of the English legal system have to take both of them into consideration. It goes without saying that a lot of the present English law has its source in the writings of Bentham. In spite of this, there is an essential difference between the statute book and the writings of Bentham. What the statute book says becomes law forthwith and *ipso jure*. What Bentham says may or may not become law and if it does become law, it is on account of the pleasure of the legislature and the courts and not because the writings of Bentham can claim to be law as a matter of right.

The decision of English courts are a legal and authoritative source of English law. The decisions of American courts in England are merely a historical and authoritative sources of law. Those judgments are shown great respect but their value is purely persuasive and not authoritative. They are not recognized by any rule of law.

The legal sources are the only codes through which new prin-

ciples can find entrance into the law. Historical sources operate only mediately and indirectly. They are merely the links in the chain and the ultimate link is supplied by some legal source.

According to Salmond, "In respect of its origin a rule of law is often of long descent. The immediate source of it may be the decision of an English court of justice. But that court may have drawn the matter of its decision from the writings of some lawyer, let us say the celebrated Fernchman, Pothier; and Pothier in his turn may have taken it from the compilations of the Emperor Justinian, who may have obtained it from the praetorian edict. In such a case all these things—the decision, the works of Pothier, the *corpus juris civilis*, and the *edictum perpetuum*—are the successive material sources of the rule of English law. But there is a difference between them, for the precedent is the legal source of the rule, and the others are merely its historical sources. The precedent is its source, not merely in fact, but in law also; the others are its sources in fact, but obtain no legal recognition as such. Our law knows well the nature and effect of precedent, but knows nothing of Pothier, or of Tribonian, or of the Urban Praetor".

Analytical jurisprudence confines itself to the study of the legal sources of law. Ordinarily, law itself lays down the method by which new principles can be admitted into law. It provides that the judicial precedents, custom, or an act of the legislature shall have the force of law. It is to be observed that the writings of commentators on Hindu and Mohammedan law are partly historical sources of law and partly legal sources. The principles laid down by Abu Hanifa and his two disciples, Abu Yusuf and Imam Mohamad, are a legal source of law where such principles have not been recognized in judicial decisions. In the case of Hindu law, the Mitakshara, the Dayabhaga, the Vyavhara Mayukha, etc., are the legal sources of law. Where the principles have already been accepted in the form of precedent, the writings are merely the historical sources of law.

### **Criticism of Salmond's Classification**

Critics find fault with Salmond's classification of sources of law into material and formal sources. Grenville L. Williams goes to the extent of omitting this distinction altogether and merely divides the sources into legal and historical sources. Williams objects to the definition of formal sources as those sources from which the law derives its force and validity. According to Salmond, the formal source was the will and power of the state as manifested in the courts of justice. According to Williams, the words "formal sources" are pointless and convey no sense. The words "the will of the state" cannot be given any definite meaning. There is no reason why the will of the state should be exhibited only through the courts of law and not through any other agency. The same could have been done by the legislature or the executive. There is no justification for putting too much emphasis on the courts.

In spite of the criticism, it is to be observed that the distinction between material and formal sources of law is in fact an attempt by Salmond to compromise two irreconcilable conceptions of the growth of law: analytical and historical conceptions of law.

### Kinds of Legal Sources

According to Salmond, the legal sources of law are four in number, *viz.*, legislation, precedent, custom and agreement.<sup>1</sup>

*Legislation* is the making of law by the formal and expressed declaration of new rules by some authority which is recognized by law to be competent for that purpose. Legislation produces statute law. A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*. Case law is developed within the courts themselves. A new rule so adopted and applied by the courts themselves is not a rule by law and the courts are under no obligation to adopt that rule. However, when the same is adopted and applied, it becomes law for the future and the courts are bound in future to follow that precedent. When the courts create a precedent, they do not legislate. They do not make any new law by a formal declaration of new principles. They merely apply a new principle to an actual case.

The *customary* law consists of those customs which fulfil the requirements laid down by law as the condition of their recognition. Custom produces customary law. Conventional law consists of agreements having the force of special law among the parties concerned. Such a law may modify or supersede the ordinary law of the country.

Thus, according to Salmond, there are four kinds of laws. Enacted law has its source in legislation. Case law has its source in precedent. Customary law has its source in custom and Conventional law has its source in convention.

1. According to Allen, "Accordingly, we shall be concerned with those sources of law which have been the most frequent subjects of jurisprudential study, though it is not pretended that they are necessarily exhaustive. They will be considered here in the order in which they normally appear in social development. Custom, as the raw material of law, is our natural starting-point, although, as we shall see, there are those who hold that judicial interpretation is anterior even to custom and is, indeed, the true genesis of it. Whether this be so or not, it is certain that the influences of popular usage and of magisterial interpretation are never far separated in social history, and perhaps it is neither possible nor profitable to insist on any uniform chronology. The subject of judicial interpretation leads us to that form of it which is of special interest in our own legal system—the doctrine and operation of precedent. Whether equity, which is next considered, is properly to be regarded as a source of law, has been much disputed, but the view here advanced is that so constant and apparently indispensable a factor in legal development deserves consideration as a 'source' rather than as a mere adventitious element. Finally, we pass to the constitutional organs of law-making in developed societies—legislation, original and subordinate." (Pp. 59-60, *Law in the Making*).

It is to be observed that Holland adds religion and equity to the above four kinds of sources of law. There are other writers who include professional juristic opinion among the legal sources of law.

In the case of India, a part of the law of the country is derived from religious sources. The Hindu law is based on the Hindu scriptures, particularly the code of Manu. Likewise, the Mohammedan law is based on the Holy Quran.

The opinions of the text-book writers are also a source of Hindu and Mohammedan law. Reference may be made in this connection to the Mitakshara and Dayabhaga of Hindu law and the Hedaya of Mohammedan law.

### Source of Law and Source of Right

The sources of law may also serve as sources of right. By a source of right is meant some fact which is legally constitutive of right. It is the *de facto* antecedent of a legal right in the same way as a source of law is *de facto* antecedent of a legal principle. Experience shows that to a large extent, the same class of facts which operate as sources of law also operate as sources of right. The two kinds of sources form intersecting circles. Some facts create law but not rights. Some facts create rights but not law. Some facts create both law and rights at the same time. The decisions of inferior courts are not sources of law but they are nevertheless sources of rights. Immemorial custom gives rise to rights and law at the same time in certain cases. An agreement operates as a source of rights. It is not exclusively a title of rights but also operates as a source of law.

### Ultimate Legal Principles

Ultimate legal principles are those self-existing principles of which no legal origin is known though it may be possible to trace them to some historical source.

All rules of law have historical sources but all of them do not have legal sources. If that were so, the search for tracing the origin of legal principles will continue *ad infinitum*. It is necessary that in every legal system, there should be found certain ultimate principles from which all others are derived but which are self-existent.

The rule that two persons should not ride on a bicycle has its source in the bye-law of a municipality. The authority of a municipality to make bye-laws is derived from an Act of the legislature but wherefrom does the legislature get its power that is legally ultimate and its source is historical only and not legal. No statute can confer this power on Parliament. Likewise, the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down.

If "An Act of Parliament is law" and "Judicial decisions have the force of law" are ultimate legal principles in England, "Con-

stitution is the supreme authority” is an ultimate legal principle in India. Nothing can be legal in India unless it is not disallowed by the Constitution. Everything has to be tested by the criterion of the Constitutional law of 1950.

### **Suggested Readings**

- Allen** : Law in the Making.
- Cardozo** : The Growth of Law.
- Carter** : Law, its origin, growth and function.
- Gray** : The Nature and Sources of the Law (1921).
- Keeton** : Elementary Principles of Jurisprudence.
- Salmond** : Jurisprudence.

## CHAPTER VIII

### LEGISLATION

The term legislation is derived from two Latin words, *Legis* meaning law and *Latum* meaning to make, put or set. *Etymologically, legislation means the making, putting or the setting of law.*

According to Salmond, "Legislation is that source of law which consists in the declaration of legal rules by a competent authority." According to Gray, legislation means "the formal utterances of the legislative organs of the society". According to Holland, "The making of general orders by our judges is as true legislation as is carried on by the Crown." Again, "In legislation, both the contents of the rule are devised, and legal force is given to it by acts of the sovereign power which produce written law. All the other law sources produce what is called unwritten law to which the sovereign authority gives its whole legal force, but not its contents, which are derived from popular tendency, professional discussion, judicial ingenuity or otherwise, as the case may be." According to Austin, "There can be no law without a legislative act." According to another writer, legislation consists in "the declaration of legal rules by a competent authority, conferring upon such rules the force of law". The term legislation is sometimes used in a wider sense to include all methods of law-making. When a judge establishes a new principle by means of a judicial decision, he may be said to exercise legislative powers and not judicial powers. However, this is not legislation in the strict sense of the term. The term legislation includes every expression of the legislature whether the same is directed to the making of law or not. An Act of Parliament may amount to nothing more than establishing a uniform time throughout the realm or altering the coinage.

#### **Supreme and Subordinate Legislation**

According to Salmond, legislation is either supreme or subordinate. Supreme legislation is that which proceeds from the sovereign power in the state. It cannot be repealed, annulled or controlled by any other legislative authority. On the other hand, subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. However, there are other organs which have powers of subordinate legislation.

#### **Subordinate Legislation**

(1) Salmond refers to five kinds of subordinate legislation. As regards subordinate legislation in the colonial field, the powers of

self-government entrusted to the colonies and other dependencies of the Crown are subject to the control of the imperial legislature which may repeal, alter or supersede any colonial enactment. However, it is to be noted that after the passing of the Statute of Westminster of 1931, the Dominion legislatures have been given the power to make any law they please. No law passed by them after the Act of 1931 can be declared inoperative or void on the ground that it is repugnant to the law of England or any Act of Parliament. Every dominion legislature has the power to repeal or amend any law.

(2) In certain cases, legislative power has also been given to the judiciary. The superior courts are allowed to make rules for the regulation of their own procedure. It is a true form of legislation although it cannot create new laws by way of precedents.<sup>1</sup>

(3) Municipal authorities are also allowed to make bye-laws

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1. According to Allen, "Of more recent growth than the Privy Council are those 'rule-making' bodies which are now very numerous, and which possess important powers of many different kinds. A conspicuous example is the Rules Committee of the Supreme Court, first set up in 1875, and now possessing an almost complete control over matters of procedure in all courts. Let nobody suppose that this is a matter of merely professional import. It is true that we have progressed beyond the days when men could, by an artificial game of pleadings, reduce the law to the paradox *ubi remedium ibi ius*; but procedural law is still, and must always be, an indispensable adjunct to substantive law, and even today a good cause may easily be thrown away by ignorance of procedural forms. Consequently every practising lawyer has to know this body of adjective law as well as, if not better than, the juristic principles of substantive law. Here, then, is an example of pure court-made law. In its origin customary, this kind of law in modern conditions becomes subject to revision and formulation by specially constituted expert authority, such as the Rules Committee which we are considering. And this form of professional autonomy, ancient as it is, shows no signs of diminishing in present circumstances. It is noteworthy, on the contrary, that the example of the Rules Committee has been very widely imitated throughout the British Empire, until with the exception of some half a dozen scattered colonies, procedure is no longer regulated by statute anywhere in the Empire, but is subject altogether to Rule of Court alterable by the local judges with the approval of the local executive. In England, this power is not confined to the Rules Committee, a fairly large and representative body, in comparatively new jurisdictions it may be entrusted to a more centralized authority. Thus, under the Matrimonial Causes Act, 1857, ss. 53 and 67, and the Judicature Act, 1875, s. 18, the President of the Probate, Divorce, and Admiralty Division has power to make rules for the procedure of his court. The power has been freely exercised in a jurisdiction where rules of practice are somewhat technical; for example, in November 1923 there were published, under the sole authority of the President, no less than ninety-eight Provisional Rules and Regulations affecting every branch of procedure in this division of the High Court, and superseding all previous rules. Of no less moment than the Rules of the Supreme Court are the County Court Rules for procedure and costs; these are drawn up by a Committee of five County Court Judges appointed by the Lord Chancellor, together with a barrister, a solicitor, and a registrar. Unlike the Rules of the Supreme Court, they are not subject to revision by Parliament, but are confirmed and put into force by the Lord Chancellor, with the concurrence of the Rules Committee of the Supreme Court. Among other important codes of Rules, we may mention the Bankruptcy Rules and the Summary Jurisdiction Rules.



for limited purposes within their areas. According to Allen, "By a series of enactments, notably the Public Health Acts, 1875-1936, the Municipal Corporations Act, 1882, and the Local Government Acts, 1888-1933, local authorities—county, borough, rural and urban district councils—have powers to enact bye-laws, binding upon the public generally, for public health and for 'good order and government'. Offences against these bye-laws are punishable on conviction by summary process by fines usually not exceeding £ 5. The range of subjects dealt with is immense : to take the commonest, we may note building, advertisements, care of the sick (hospitals, vaccination, infectious diseases), cleanliness of dwelling-houses, housing of the working classes, town-planning schemes, nuisances, scavenging and cleansing, police, rating, education, traffic, highways, burials, and the conduct generally of persons in public places. All these matters, and their many analogous in local government, count for no less in the daily lives of ordinary citizens than the enactments of Parliament. The far-off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the Constitution, to the plain law-abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors."

(4) Sometimes the state allows private persons like universities, railway companies, etc., to make bye-laws which are recognized and enforced by law-courts. Such legislation is usually called *autonomic*. The railway company may make bye-laws for the regulation of its undertaking. Likewise a university may make statutes for the government of its members.

(5) Another kind of subordinate legislation is executive legislation or *delegated legislation*. It is true that the main function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called subordinate or delegated legislation. Delegated legislation is becoming more and more important in modern times. To quote Baldwin, "In the three years from 1925-1928, the average number of Acts was 506. The average number of pages occupied by them 539 ; while the average number of Statutory Rules and orders was 1408.6 and the average number of pages covered by them was 1849."

Many factors have been responsible for the growth of delegated legislation. The concept of the state has changed and instead of talking as a police state, we think in terms of a welfare state. This change in outlook has multiplied the functions of the government. This involves the passing of more laws to achieve the ideal of a welfare state. Formerly, every bill used to be a small one but civilization has become so complicated that every piece of legislation has to be detailed. The rise in the number and size of the bills to be passed by Parliament has created a problem of time. It is realized that all this legislation cannot be

enacted even if the members of Parliament are prepared to work day and night. The result is that Parliament resorts to the device of passing skeleton bills and leaving the work of filling in the details to the departments concerned.

Modern legislation is becoming highly technical and it is too much to expect that the ordinary members of Parliament will appreciate all the implications of modern legislation. Except a few experts in certain lines, the other members of Parliament are bound to bungle if they attempt to do the impossible. Under the circumstances, it is considered safe to approve of general principles of legislation and leave the details to the ministries concerned.

The time available for drafting bills to be passed into law by Parliament is not adequate. If an attempt is made to draft detailed bills within the short period, the drafting is bound to be defective. No wonder, power is delegated to the departments concerned to issue Orders-in-Council which can be made at leisure and which can be expected to be logical and intelligible.

It is impossible for any statesman or civil servant to foresee all contingencies that might arise in the future and provide for them in the bill when it is being passed by Parliament. It is convenient if some power is given to the department concerned to add to the details to meet any contingency in future. Moreover, full knowledge of the local conditions may not be available to the government at the time of the passing of the law and it is desirable to adjust the law by means of Orders-in-Council to meet the requirements of the various localities. Delegated legislation gives flexibility to law and there is ample scope for adjustment in the light of experience gained during the working of any particular legislation.

C. T. Carr has suggested certain safeguards to avoid the evils of delegated legislation which is otherwise inevitable. Delegation of legislative powers should be made to a trust-worthy authority. The limits within which the delegated powers are to be exercised should be defined clearly and the courts should be given the power to declare any piece of delegated legislation as *ultra vires* which is beyond the power given to the authority concerned. The particular interests involved should be consulted by the authority concerned at the time of issuing Orders-in-Council. There should be antecedent publicity for delegated legislation and also for amending or revoking delegated legislation. The rules and regulations made under delegated legislation should be put before the legislature before they come to have the force of law. If they are not approved by the legislature, they must lapse. Expert advice should also be taken at the time of making rules and regulations. All delegated legislation must be subject to judicial control and review. It must not be repugnant to the statute under which it is made. It must not be vague or uncertain. It must not be unreasonable.

It must be allowed to be controlled by the courts by means of the appropriate writs.

### Legislation and Precedents

It may be desirable to compare legislation with precedents and customary law. As regards legislation and precedents, the former has its source in the law-making will of the state. On the other hand, precedent has its source in the *ratio decidendi* and *obiter dicta* of the judicial decision. Legislation is imposed on courts by the legislature but precedents are created by the courts themselves. Legislation is the formal and express declaration of new rules by the legislature, but precedents are the creation of law by the recognition and application of new rules by courts in the administration of justice. It is a judicial decision which provides a rule of law for subsequent decisions. Legislation creates statute law and precedents create judge-made law. Legislation comes before a case arises requiring its application. Precedent comes after the case has arisen. Legislation is expressed in a general and comprehensive form but precedent is in a particular and limited form. Legislation is abstract but precedent is definite. However, a precedent primarily settles a particular dispute between definite parties. It is easy to interpret a statute than to interpret a precedent. While legislation is ordinarily prospective, precedent is retrospective only.<sup>1</sup>

### Legislation and Custom

As regards legislation and customary law, legislation grows out

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1. According to Allen, Whereas precedent is inductive, enactment clearly imposes the necessity of deduction upon the courts. It is general and comprehensive in form, precedent particular and limited. A decision, whatever implications may be read into it by subsequent comparison and interpretation, exists primarily for the settling of a particular dispute; a statute purports to lay down a universal rule. This rule it may create for the first time : or it may, if of a declaratory or consolidating kind, weld existing and possibly conflicting rules into a compendious form. For the most part, its operation is prospective, though it may thrust back into the past if it chooses. It possesses a power of self-criticism and self-revision which precedent can exercise only indirectly and in a very subordinate degree. Abrogation is a highly important attribute of statute as applied both to preceding statutes and to rules, or supposed rules, created by decisions. Precedent is constitutive, it is carried on by its own momentum, and cannot retrace its steps. Nothing which is a true precedent, in the sense that it correctly embodies a rule of the Common Law, can be reversed by subsequent decision. Precedent may be discarded either because it is not applicable to the case in hand, or because it proceeds on a misunderstanding of the law : because it is not law, never was the law, and therefore never was a precedent properly so called. As we have seen, this power of scrutinizing the principles which cases purport to contain does give superior courts a certain degree of censorship over the operation of precedent—a censorship, however, which is exercised with great caution as against the claims of antiquity. But it gives them no control over the principles themselves. The abrogative work of the legislature is subject to no such reservations. It eliminates or modifies a principle not because it is 'not law', but exactly because it is law. It can put an end to that which has been as freely as it can call into being that which has never been. Hence much of the work of the legislature is purely negative in effect; and this is a grave objection to the conception of law as being solely a positive command",

of theory but customary law grows out of practice. While the existence of legislation is essentially *de jure*, the existence of customary law is essentially *de facto*. Legislation is the latest development of law-making tendency, the customary law is the oldest form of law. Legislation is the mark of advanced society and a mature legal system. Customary law is the mark of primitive society and an undeveloped legal system. Legislation expresses a relationship between man and the state but customary law expresses the relationship between man and man. Legislation is complete, precise and easily accessible, but the same cannot be said about customary law. Legislation is *jus scriptum* but customary law is *jus non scriptum*. Legislation is the result of a deliberate positive process but customary law is the outcome of necessity, utility and imitation. According to Keeton, "In early times, legislation either defined or supplemented custom, today the relative positions of custom and legislation have been reversed. Statute law is the principal source of modern law ; custom only persists where legislation has as yet not penetrated. . . . Legislation, stripped of all divine associations, is really a very convenient method of making law. It is quickly made, definite, easy of access, and easy to prove. However, since the development of representative institutions, it may be regarded as the closest approximation to the general will that can be secured. Custom, on the other hand, requires many years to form, is rarely absolutely clear, and is in consequence more difficult to prove. To repeal a statute, it is merely necessary to pass another one, avoiding it. To repeal a custom by desuetude is a long and extremely uncertain business. It is always much more convenient to repeal a custom by statute."

According to Allen, "The difference between custom and legislation as sources of law is manifest. The existence of the one is essentially *de facto*, of the other essentially *de jure*. Legislation is therefore the characteristic mark of mature legal systems, the final stage in the development of law-making expedients. In short, while custom expresses a relationship between man and man, legislation expresses a relationship between man and state. It cannot exist until the notion of a central State, whether or not it be 'sovereign' in the conventional sense, has crystallized. It may be objected that we have been taught for many years past that legislation, in the form of codes, is one of the earliest sources of law. But this is legislation in a very different sense. It does not proceed from anything which modern theory has taught us to regard as 'sovereign', but usually from a source deemed to be either divinely inspired or itself divine."

### **Advantages of Legislation over Precedent**

Legislation as a source of law has many advantages over precedent. (1) Legislation is both constitutive and abrogative, but precedent is merely constitutive. Legislation is not only a source of new law but also the most effective instrument of abolishing the exis-

ting law. Abrogative power is necessary for legal reform and this virtue is not possessed by precedent which can produce new law but cannot reverse that which is already law. Legislation is a necessary instrument not only for the growth of law but also for its reform.

(2) Legislation is based on the principle of division of labour and consequently enjoys the advantage of efficiency. The legislative and judicial functions are separated and consequently both of them are done better by different organs. Legislature attends to the work of legislation and judiciary attends to the work of interpreting and applying the law. In the case of precedent, the functions of legislation and interpretation are combined and that is hardly desirable.

(3) Legislation satisfies the requirement of natural justice that laws shall be known before they are enforced. Law is declared in the form of legislation and the same is later on enforced by the courts. Law is formally declared to the people and if after that they dare to violate the same, they are punished. However, that is not the case with precedent. It is created and declared in the very act of applying and enforcing it. There is not any formal declaration of precedent. It is applied as soon as it is made. It operates retrospectively and applies to facts which are prior in date to law itself. However, it is pointed out that modern statutes are so numerous and so complicated that it is doubtful whether their promulgation secures wider knowledge of the new principles than any important decision. In any case, until they have been construed by actual decisions, their effect is doubtful. Moreover there is nothing in the nature of legislation to prevent it from having a retroactive effect so as to alter the legal consequences of acts already done. Any considerable alteration of principles must have some retroactive effect as long-term arrangements will have been entered into on the assumption that law will remain unchanged.

(4) Legislation makes rules for cases that have not yet risen but precedent must wait until the actual concrete incident comes before the courts for decision. Precedent is dependent on the accidental course of litigation but legislation is independent of it. A precedent must wait till such time as a case is brought for decision before a court of law. Legislation can move at once to fill up the vacancy or settle a doubt in the legal system.

(5) Legislation is superior in form to precedent. It is brief, clear, easily accessible and knowable. Case law is buried from sight and knowledge in the huge and daily growing mass of the records of litigation. "Case law is gold in the mine, a few grains in the precious metal to the tons of useless metal, while statute law is coin of the realm ready for immediate use." However, it is pointed out that it is not true in the case of English statute law. Sometimes, the statutes are so drafted as to simplify the law, but usually important statutes require elaborate editing with copious

references to cases as soon as they are enacted. Reference may be made in this connection to the Local Government Act, 1933. It is true that continental codes have facilitated the scientific arrangement of legal topics, but even they have proved unworkable without much comment and the guidance of successive decisions. The constantly increasing bulk of reported cases on the existing law is proving to be a burden everywhere.

According to Prof. Freundmann, "It will be difficult to deny that in modern circumstances development of law through precedent is slow, costly, cumbrous, and often reactionary. It is therefore less suitable for a time of fast changes and restlessness such as ours. It is also dependent upon a continuity and steadiness of social conditions which may not last. Perhaps none but British judges could have worked it in such a way as to make it withstand, at least partially, the onslaught of centuries. Many present-day judges find that the only way of preserving the system is to take a bold attitude towards antiquated precedents, and to form the law in terms of broad principles. But others take the view that law reform should be left to the legislator. As a result the judicial approach to law reform, under a precedent system, is increasingly uncertain, and more influenced by changes in the judicial personnel than a code law system. Consequently the sphere left to judicial law-making diminishes steadily, even if it tries to engraft itself upon statutory interpretation". (P. 492, Legal Theory).

### **Advantages of Precedent over Legislation**

(1) Precedent also has certain advantages over legislation. According to Dicey, "The morality of the courts is higher than the morality of the politicians." Politicians are always swayed by popular passions and are liable to make bad laws. On the other hand, judges decide cases in a calm atmosphere and can afford to hold the scales even between the contending parties. They perform their functions impartially and fearlessly.

(2) According to Salmond, case law enjoys greater flexibility than statute law. Statute law suffers from the defect of rigidity. Courts are bound by the letter of law and are not allowed to ignore the same. In the case of precedent, analogical extension is allowed. It is true that legislation as an instrument of reform is necessary but it cannot be denied that precedent has its own importance as a constitutive element in the making of law although it can not abrogate law. In the case of England, the courts of equity played an important part in mitigating the rigours of common law by means of precedents.

(3) According to Amos, law does not become more uncertain when it is based on precedents than when it is founded on enacted law. Although French law is codified, it is still far from being uncertain. The uncertainty of English law is nothing when compared to that of France. A French advocate has to wade

through a set of French codes, interpretations and commentaries as an English lawyer has to do. The enactment of a law is no cure for uncertainty in a legal system. Neither legislation nor precedent alone can completely meet all eventualities. The gaps have to be filled by legislation and precedents.

### **Codification**

There is a general tendency in modern times towards the codification of laws. There is an effort to reduce the medley of customary, canon and enacted law into codes. However, codification does not imply the total abolition of precedent as a source of law. Case law will continue to grow even when the codes are complete. Codification merely means the reversal of the relation between case law and statute law. It means that the substance and body of the law shall be enacted law and case law shall be incidental and supplementary only.

### **Merits**

(1) The one great merit of codification is that law can be known with certainty. The law of contract in India can be found by a reference to the Indian Contract Act. Likewise, the rules of evidence in the country can be known by a study of the Indian Evidence Act. The certainty of law avoids confusion in the public mind.

(2) Another advantage of codification is that the evils of judicial legislation can be avoided. According to Macaulay, "Judge-made law in a country where there is an absolute government and lax morality—where there is no Bar and no public—is a curse and scandal not to be endured." According to Sir James Stephen, "Well-designed legislation is the only possible remedy against quibbles and chicanery. All the evils which are created from legal practitioners can be averted in this way and in no other. To try to avert them by leaving the law undefined and by entrusting judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a judge with no rule or with one of those leaden rules which can be twisted in any direction, and you at once open to the advocate every sort of topic by which the discretion of the judge can be guided. Shut the lawyer's mouth and you fall into the evils of arbitrary government."

(3) Codification is necessary to preserve the customs which are suited to the people of a country. According to Rattigan, "To codify, on the other hand, the existing customs would perpetuate that system or retard its break-up. We should, therefore, not be hampering a healthy development but avoiding a disastrous tendency to disruption. We should not be asphyxiating progress to ensure the prosperity of agricultural classes by preserving for them the position of their lands and the constitution of their communities. We should not be introducing any novel or dis-

tasteful legislation but doing our best to maintain all that was healthy and good in a system which was suited to the people."

(4) The codification of law is necessary to bring about a sense of unity in the country. To quote a despatch of the Government of India to the Secretary of State for India, "We feel that the reduction to a clear, compact and scientific form of the different branches of our substantive laws which are still uncoded, would be a work of the utmost utility; not only to the judges and the legal profession but also to the people and the government. It would save labour and thus facilitate the despatch of business and cheapen the cause of litigation; it would tend to keep our untrained judges from errors; it would settle disputed questions on which our superior courts are unable to agree; it would preclude the introduction of technicalities and doctrines unsuited to this country; it would perhaps enable us to make some urgently needed reforms without the risk of existing popular opposition and it would assuredly diffuse among the people of India the more accurate knowledge of rights and duties than they will ever attain if their law is left to its present stage."

### **Demerits**

(1) Codification is not an unmixed blessing. It has its demerits also. Codification brings rigidity into the legal system. It cramps and impedes the free and natural growth of law. The law becomes petrified at the stage at which it is codified. According to Cardozo, "The inn that shelters the traveller for the night is not the journey's end. The law, like the traveller, must be ready for tomorrow. It must have a principle of growth." According to Roscoe Pound, "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of change. The social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interest as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of changes no less than principles of stability. Accordingly, the chief problem to which legal thinkers have addressed themselves has been how to reconcile the idea of a fixed body of law, affording no scope for individual wilfulness, with the idea of change and growth and making of new law; how to unify the theory of law with the theory of law-making and to unify the system of legal justice with the facts of administration of Justice by Magistrates." According to Cockburn, "Whatever disadvantages attach to any unwritten law, and of these we are fully sensible, it has at least this advantage that its elasticity



enable those who administer it to adopt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." According to Sir James Stephen, "Those who consider that codification will deprive the common law of its elasticity appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise."

(2) Codification results in the regimentation of the life of the people. A code gives a uniform law to the whole country. It does not bother about the differences in the sentiments, convictions, aspirations, customs and traditions of the people living in different parts of the country. Unfortunately, the various classes in society do not run on the same road and at the same speed. The result is that liberty and individuality are sacrificed at the altar of uniformity.

(3) A code is the work of many persons and no wonder the provisions of a code are found to be incoherent. However, if the work is done by competent persons, this defect can be avoided to a great extent.

(4) Codification makes the law simple and thereby enables the knaves to flourish. They know the law and before committing a crime, they can provide against the same. According to Savigny, a code makes the defects of law obvious and thereby encourages the knaves to take advantage of them. However, it is pointed out that there are greater chances for knaves when the law is not clear. Uncertainty of law is more to their advantage.

(5) A code is likely to disturb the existing rights and duties of the people by creating new rights and duties in place of the old ones. It disturbs the fabric of legal order and creates confusion and uncertainty.

(6) Critics point out that the codes of France and Germany have failed and consequently it is useless to have them. However, it is not correct to say that all codes have failed. It is rightly pointed out by Sir James Stephen that Indian Codes have been "triumphantly successful". According to Chalmers, "All the continental nations have codified their laws and none of them show any sign of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing Codes. In India, a good deal of codification has been carried on, and public and professional opinion seems almost unanimous in its favour."

(7) No code can be complete and self-sufficing. In course of time, every code is overlaid with an accumulating mass of comments and decisions. However, this defect can be avoided by

revising the Code from time to time. To quote Lord Macaulay, "The publication of this collection of cases decided by the legislating authority will, we hope, greatly limit the power which the Courts of Justice possess of putting their own sense on the laws. But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the Code. Such questions will certainly arise, and unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the Legislature.....it is most desirable that measures should be taken to prevent the written law from being overlaid by an immense weight of comments and decisions."

(8) According to Savigny, if an age is capable of producing a good code, no code is necessary in that case. The work of a code can be done by the jurists, lawyers and private expositors. However, it cannot be denied that such expositions lack authority and certainty and the judges are not bound to follow them.

(9) According to Salmond, "The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process known since Bentham as codification."

According to Portalis, "Whatever is done, positive laws can never entirely replace the use of natural reason in the affairs of life. The needs of society are so varied, social intercourse is so active, men's interests are so multifarious, and their relations so extensive, that it is impossible for the legislator to provide for everything.

"It is then, to the course of decision (*la jurisprudence*) that we leave (1) rare and extraordinary cases which cannot enter into a reasonable legislative plan, (2) details too variable and contentious to occupy the legislator and (3) all those objects which it would be a useless effort to anticipate, or of which premature anticipation would be dangerous.

"It is for experience to fill progressively the gaps we leave. The code of a people makes itself with time ; properly speaking it is not made."

### **Rules of Interpretation : Grammatical Interpretation**

According to Salmond, "By interpreting or construction is meant the process by which the courts seek to ascertain the meaning of legislation through the medium of the authoritative forms in which it is expressed." Salmond refers to two kinds of interpretations, *grammatical* and *logical*. In the case of *grammatical interpretation*, only the verbal expression of law is taken into consideration and the courts do not go beyond the *littera legis*. In the case of *logical interpretation*, the courts are allowed to depart from the

letter of the law and try to find out the true intention of the legislature. It is the duty of the courts to discover and act upon the *true intention* of the legislature. In all ordinary cases, it is the duty of the courts to content themselves by accepting the grammatical interpretation as the true intention of the legislature. It should be taken for granted that the legislature has said what it meant and meant what it has said. The judges are not at liberty to add to or take away from or modify the letter of the law simply because they feel that the true intention of the legislature has not been correctly expressed in the law itself. In all ordinary cases, grammatical interpretation is the only interpretation allowable.

In the *Sussex Peerage Case*, it was rightly observed that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law-giver." According to Lord Brougham, "The construction of an Act must be taken from the bare words of the Act." We cannot fish out what possibly may have been the intention of the legislature. We cannot aid the legislature's defective phrasing of the statute. We cannot add and mend and by construction make up deficiencies which are left there. And, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply the meaning and supply the defect in the previous Act." According to Lord Wensleydale, "In construing statutes, as in considering all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further." According to Paulus, the Roman jurist, "Where there is no ambiguity in the words, the question of intention ought not to be admitted."

Salmond refers to three logical *defects* by which grammatical interpretation may be affected. (1) The first defect is that of *ambiguity*. The language of a statute may be such that instead of having one meaning, it may be possible to put two or more meanings on the same word. In such cases, it is the right and duty of the courts go behind the letter of the law and try to find out the true intention of the legislature. When two meanings are possible, that which is more natural, obvious and consonant with the ordinary use of language should be put. (2) Another defect is that of *inconsistency*. The different parts of the law may be inconsistent with one another and thereby destroy and nullify their meaning. In such a case, it is the duty of the courts to find out the true intention of the legislature and correct the letter of the law. (3) Another logical defect may be that law in itself is *incomplete*. There may be some lacuna in the law itself and that may not allow the

whole meaning to be expressed. In such cases, the defect can be remedied by logical interpretation and not grammatical interpretation. However, the omission in the law must be such as to make the same incomplete logically. If law is logically complete, the courts have no business to interfere with the same. Their duty is merely to apply the letter of the law and not to alter the same to suit their reasoning. They are not entitled to assume legislative powers.

According to Allen, "The criticisms of our present rules of statutory interpretation have taken three principal forms. It is objected that the whole doctrine of literal interpretation rests upon a fallacy. Words mean nothing by themselves: the very conception of interpretation connotes the introduction of elements which are necessarily extrinsic to the words themselves. 'Words', writes Professor H. A. Smith, 'are only one form of conduct, and the intention which they convey is necessarily conditioned by the context and circumstances in which they are written or spoken. No word has an absolute meaning for no word can be defined *in vacuo* or without reference to some context.... The practical work of the Courts is very largely a matter of ascertaining the meaning of words and their function therefore becomes the study of contexts. Since the number and variety of contexts is only limited by the possibilities of human experience, it follows that no rules of interpretation can be regarded as absolute.'

"It seems to follow that 'the plain and unambiguous meaning of words', by which the courts so often believe themselves to be governed (frequently with inconvenient consequences), is really a delusion, since no words are so plain and unambiguous that they do not need interpretation in relation to a context of language or circumstances. Without this process, 'intention' is always undiscoverable. There has, it is urged, been far too much tendency in our law to regard words as self-contained, self-sufficient 'things', whereas Continental jurisprudence is more ready to regard them as that which they should be, *i. e.*, vehicle of meaning.

"Much of our case-law certainly suggests that the letter killeth more often than the spirit giveth life. We have a most elaborate code, slowly and painfully built up, for literal interpretation, and there is not a comma or a hyphen which has not its solemn precedent. No attempt has been made in these pages to enter into the details of this lore, for it is matter of pure technique which may be found in many books of reference. There is much reason for thinking that if the same amount of attention had been paid to the more difficult and elusive principles of Heydon's Case... if, in short, our statutory interpretation had not so weakly followed the line of least resistance... many existing anomalies in our law might have been avoided. The attractions of literal interpretation have not been enhanced

by the characteristics of the English language, which does not, like Latin or French, readily lend itself to precise and lucid expression."

"There are two other factors which tend to perpetuate the rigidity of literal interpretation in our law. The first is the effect of the doctrine of precedent, which exercises as important an influence here as in all other branches of judicial technique. 'Under our system', the Judicial Committee has said, 'decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the term of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.' What is true of 'undue extension' is also true of undue restriction; a narrow literal interpretation, once established by precedent, may become fixed in perpetuity. Exactly at what point it becomes fixed is not easy to say. Sir George Jessel M. R., in *In re Bethlem Hospital* (1875), L. R. 19 Eq. 457, declared that he would not consider himself bound by a statutory interpretation of which he disapproved unless 'the authorities were numerous.' He went on to point out that when a certain interpretation has been thus established by a line of authorities, a judge, in approaching a statute, does not really 'interpret' it at all—that is, he is not free to exercise his own mind upon the meaning of the text before him. This combination, or conflict—whichever it may be considered—of the authority of precedent and the authority of statute cannot be described as happy. The second petrifying factor is the real or supposed rule (now, however, questioned) that once a word or phrase has been given a certain judicial meaning, it is deemed to bear that meaning not only in all subsequent cases, but in all subsequent statutes. This is an offshoot of the somewhat optimistic assumption that the legislature must be presumed to know the actual state of the law. Consequently, if a word has once been given a particular meaning in any case of authority, however obscure, in connexion with any statute, however recondite, the draftsman who uses that word in a later enactment is, so to speak, 'affected with notice' of the judicial interpretation, however remote it may be from the matter in hand. It need hardly be said that in the huge mass of our caselaw this assumption is a transparent fiction. Much labour on the part of draftsmen, and some elaborate devices, are needed to guard against it."

### **Logical Interpretation**

Logical interpretation is to be put on a statute only when grammatical or literal interpretation is not possible. In such cases, the true intention of the legislature has to be found out by referring to other facts. If the words are ambiguous, that interpretation is to be preferred which prevents the law from becoming absurd

and a dead letter. In the case of two or more alternative interpretations, that interpretation is to be preferred which is required to fulfil the object of law itself. According to Gray, "Logical interpretation calls for the comparison of the statute with other statutes and with the whole system of law and for the consideration of the term and circumstances in which the statute was passed." According to Allen, "Nowhere it is more apparent than in the construction of enactments that words 'half reveal and half conceal the thought within'. Unfortunately, a statute must be of revelation and in nowise concealment, if it is to avoid a darkening counsel. In the task of liberal or grammatical interpretation, judges are constantly reminded to their unfeigned chagrin of the imperfection of the human language. The style of statute has differed greatly from age to age."

The logical method takes into consideration the historical facts and the needs of society. It is the duty of the court to consider the circumstances under which the law was passed and the mischief which it was intended to remedy. Only that interpretation should be put which is liable to suppress the mischief and help the cause of remedy. However, courts are not allowed to refer to the debates on the bill, the fate of amendments proposed and dealt with by the legislature.

In the case of logical interpretation, it is the duty of the courts to take into consideration the object of the Act and the needs of society. That interpretation is to be put which advances the cause of justice. According to Kohler, "Rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically; they are to be interpreted as products of the whole people whose organ the law-maker has become." According to Cardozo, "Formerly, men looked upon law as the conscious will of the legislator. Today, they see in it a natural force. It is no longer in text or in systems derived from reason that we must look for the source of law; it is in social utility, in the necessity that certain consequences shall be attached to given hypotheses. The legislator had a fragmentary consciousness of this law, he translated it by the rules which he describes. When the question is one of fixing the meaning of those rules, where ought we to search? Manifestly at their source, that is to say, in the exigencies of social life. There resides the strongest probability of discovering the sense of the law. In the same way, without the question of supplying the gaps in the law, it is not of logical deduction, it is rather of social needs, that we are to ask the solution."

It cannot be denied that both the grammatical and logical interpretations are equally important. They have been compared to two foot-steps required for walking on the road. The help of both of them is essential for interpreting statutes. To quote Salmond, "The maintenance of a just balance between the competing claims of these two forms of interpretations is one of the

most important elements in the administration of statute law. On each side there are dangers to be avoided. Undue laxity on one hand sacrifices the certainty and uniformity of the law to the arbitrary discretion of the judges which administer it, while undue strictness on the other hand sacrifices the true intent of the legislature and the rational development of the law to the tyranny of words."

### Rules of Interpretation of Statutes

There are certain well-known rules of interpretation of statutes.

(1) According to Lord Simon, "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shirk from an interpretation which will reverse the previous law, for the purpose of a large part of our statute is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to apply their opinion of sound policy so as to modify the plain meaning of statutory words, but where, in constrained general words, the meaning of which is not entirely plain, there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

(2) The statute must be read as a whole and construction should be put on all parts of the statute. According to Lord Halsbury, "You must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it." According to Lord Davey, "Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter."

(3) The statute should be construed in a manner to carry out the intention of the legislature. According to Lord Blackburn, "I quite agree that in construing an Act of Parliament, we are to see what is the intention which the Legislature has expressed by the words, but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the Legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced." According to Lord Radcliffe, "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expoun-

ded according to its manifest and expressed intention." The fundamental rule of interpretation to which all others are subordinate, is that a statute is to be expounded "according to the intent of them that made it." According to Lord Simond, "The duty of the court is to interpret the words the legislature has used ; those words may be ambiguous. But, even if they are, the powers and duty of the court to travel outside them on a voyage of discovery are strictly limited, see for instance, *Assam Railways and Trading Co. v. I. R. C.* and particularly the observations of Lord Wright." It is not the duty of courts to fill up the gaps in a statute. To do so is to usurp the legislative function under the thin disguise of interpretation. If a gap is discovered, it is for the legislature to fill up the same.

(4) The interpretation of a statute should be in accordance with the policy and object of the statute in question. According to Lord Halsbury, "It is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which it was intended to remedy." According to Lord Goddard, "A certain amount of common sense must be applied in construing a statute. The object of the Act has to be considered." According to Channell J., "It is always necessary in construing a statute and in dealing with the words you find in it to consider the object with which the statute was passed ; it enables one to understand the meaning of the words introduced into the enactment." According to Lord Cave, "I base my decision on the whole scope and purpose of the statute and upon the language of the sections to which I have specifically referred."

(5) The words used in a statute should be construed in the popular sense. If those are used in connection with some particular business or trade, they will be presumed to be used in a sense appropriate to or usual in such business or trade. According to Lord Hewart, "It ought to be the rule and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

(6) The words in a statute should be taken to have been used in the sense that bore at the time the statute was passed. According to Lord Esher, "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed."

(7) There is a presumption in the construction of statutes that the same words are used in the same meaning in the same statute and a change of language is an indication of change of intention on the part of the legislature. According



to Lord Shaw, "In the absence of any context indicating a contrary intention, it may be presumed that the legislature intended to attach the same meaning to the same words when used in a subsequent statute in a similar connection." According to Lord MacMillan, "When an amending Act alters the language of the principal statute, the alteration must be taken to have been made deliberately. In tax legislation, it is far from uncommon to find amendments introduced at the instance of the Revenue Department to obviate judicial decisions which the department considers to be attended with undesirable results."

(8) If the language of a statute is clear, it must be enforced although the result may seem harsh or unfair or inconvenient. It is only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope. According to Tindal C. J., "Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature." According to Lord Birkenhead, "The consequences of this view will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculation as to the probable intention of the legislature."

(9) As far as possible, statutes should be interpreted in such a way as to avoid absurdity. According to Jervis, C. J., "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

(10) The doctrines of *expressio unius exclusio alterius* and *Ejusdem generis* apply in the interpretation of statutes. The first doctrine means that the expression of one person or thing implies the exclusion of other persons or things of the same class which are not mentioned. The term "*Ejusdem generis*" means "of the same kind". According to Collick, it is the general rule of construction that where a broad class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *Ejusdem generis* with such class." According to Lord Halsbury, "There are two rules of construction now firmly established as part of our law. One is that words, however general, may be limited in respect to the subject-matter in relation to which they are used. The other is that the general words may be restricted to the same *generis* as the specific words that precede them."

(11) It is not the business of a court to fill up the gaps in a

statute. That is the function of a legislature. According to Lord Wright, "It may be that there is a *casus omissus*, but if so, that omission can only be supplied by a statutory action. The court cannot put into the Act words which are not expressed and which cannot reasonably be implied on any recognised principles of construction. That would be the work of legislation, not of construction, and outside the province of the court." However, courts have occasionally tried to fill up the gaps, although this tendency is not approved of.

(12) The general rule of interpretation is that no law is to have retrospective effect unless a specific intention to that effect is given in the statute itself. Ordinarily, all laws are to be interpreted to have prospective effect only. According to Scrutton, L. J., "*Prima facie*, an Act deals with future and not with the past events. If this were not so, the Act might annul rights already acquired, while the presumption is against the intention." According to Wright J., "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation, it ought to be construed as prospective only." According to Lindley, L. J., "It is fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary."

(13) Nobody has a vested right in procedure. There is no presumption that a change in procedure is *prima facie* intended to be prospective only and not retrospective. According to Blackburn, "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

(14) While interpreting a statute, certain presumptions have to be taken into consideration by the courts. It is always to be presumed that the legislature does not make mistakes, and if it actually does make a mistake, it is not for a court to correct the same. According to Lord Halsbury, "But I do not think it competent for any court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed on the assumption that the legislature is an ideal person that does not make mistakes." According to Lord Loreburn, "It is quite true that in construing private Acts, the rule is to interpret them strictly against the promoters and liberally in favour of the public, but a court is not

at liberty to make laws however strongly it may feel that Parliament has overlooked some necessary provision or even has been over-reached by the promoters of a private Bill."

(15) Another presumption is that the legislature knows the practice. According to Hamilton, L. J., "I think it is a sound inference to be drawn as a matter of construction that the legislature, aware as I take it to have been, of the practice of these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry and that the usual incidents should attach in default of any special enactment, including the incident that the Board would treat the report as confidential."

(16) Another presumption is that the legislature does not intend what is inconvenient or unreasonable. According to Lindley, "Unless Parliament has conferred on the court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might seriously affect foreigners who are not resident here and give offence to foreign governments." According to Brett, M.R., "With regard to inconvenience, I think it is a most dangerous doctrine. I agree that if the inconvenience is not only great, but what I may call an absurd inconvenience in reading an enactment in its ordinary sense, whereas if you read it in a manner of which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning. If an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense it can bear, though not exactly its ordinary sense, it will produce no injustice, then I admit one must assume that the legislature intended that it should be so read as to produce no injustice."

(17) Another presumption is that the legislature does not intend any alteration in the existing law except what it expressly declares. According to Lord Wright, "The general rule in exposition of all Acts of Parliament is somewhat this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a consideration as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare". According to Devlin, J., "A statute is not to be taken as affecting a fundamental alteration in the general law unless it uses words which point unmistakably to that conclusion".

(18) Another presumption is that public or private vested rights are not taken away by the legislature without compensation. According to Bowen, L. J., "In the consideration of statutes, you must not construe the words so as to take away rights which already exist before the statute was passed, unless you have plain

words which indicate that such was not the intention of the legislature". According to Brett, M.R., "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged to so construe it".

(19) Another presumption is that statutes do not violate the principles of International Law. According to Craies, "The Judges may not pronounce an Act *ultra vires* as contravening international law, but may recoil, in case of ambiguity, from a consideration which would involve a breach of the ascertained and accepted rules of international law".

(20) It is a rule of interpretation well-settled that in construing the scope of a legal fiction it will be proper and even necessary to assume all those facts on which the fiction can operate. A consideration which would defeat the object of the legislation must, if that is possible, be avoided (A. I. R. Supreme Court 352).

(21) The test of pith and substance is generally and more appropriately applied when a dispute arises as to the legislative competence of the legislature, and it has to be resolved by a reference to the entries, to which the impugned legislation is relatable. When there is a conflict between two entries in the legislative lists and legislation by reference to one entry would be competent but not by reference to the other, the doctrine of pith and substance is invoked for the purpose of determining the true nature and character of the legislation in question (A. I. R. 1961 Supreme Court 232).

(22) While interpreting a taxing statute, equitable considerations are entirely out of place. Likewise, taxing statutes cannot be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed. It cannot imply anything which is not expressed. It cannot import provisions in the statutes so as to supply assumed deficiency (A. I. R. 1961 Supreme Court 1047).

(23) The tendency of the courts towards technicality is to be deprecated. It is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter. They cannot be broken. Others are only directory and a breach of them can be overlooked provided there is a substantial compliance with the rules read as a whole and provided no prejudice ensues. When the legislature does not itself state which is which, Judges must determine the matter and exercising a nice discrimination sort out one class from the other along broad-based common sense lines (A. I. R. 1956 Supreme Court 140).

(24) In determining the constitutionality of a statute, the court is not concerned with the motives of the legislature, and whatever

justification some people may feel in their criticisms of the political wisdom of a particular legislative or executive action, the Supreme Court cannot be called upon to embark upon an enquiry into public policy or investigate into questions of political wisdom or even to pronounce upon motives of the legislature in enacting a law which it is otherwise competent to make (A. I. R. 1959 Supreme Court 860).

(25) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal is not a mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the *lis* commences and although it may be actually exercised when the adverse judgment is pronounced, such right is to be governed by the law prevailing at the date of the institution of the suit or proceedings and not by the law that prevails at the date of its decision or at the date of the filing of the appeal. This vested right of appeal can be taken away only by a subsequent enactment if it so provides expressly or by necessary intendment and not otherwise (A. I. R. 1957 Supreme Court 540).

(26) In the case of a penal statute, no proceedings under it are generally maintainable in respect of acts done before the commencement of the statute, unless the statute includes such acts by express provision or necessary intendment. The act which was not an offence at the time it was done under the law then prevailing, cannot become so by reason of the operation of some statute which itself came into existence at a subsequent date. All penal statutes have to be construed strictly in favour of the accused.

### Suggested Readings

Allen	: Law in the Making.
Brown	: Principles of Modern Legislation.
Dicey	: Law of the Constitution.
Friedmann	: Law & Social Change.
Jennings	: The Law & the Constitution.
Keir and Lawson	: Cases in Constitutional Law.
Maxwell	: Interpretation of Statutes.
Odgers	: The Construction of Deeds and Statutes.
Salmond	: Jurisprudence.

## CHAPTER IX

### PRECEDENT

#### **Precedent as Source of Law**

Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. According to Salmond, "The great body of the unwritten law is almost entirely the product of outside cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward the First at the close of the 13th century.... In practice, if not in theory, the common law of England has been created by the decisions of English judges." The one reason why precedent occupies so high a place in the English system is that English judges have occupied a very high position in the country. They have been experts in their line and consequently their decisions have enjoyed high reputation. The Bench has always given law to the Bar in England.<sup>1</sup>

However, there are some writers who are of the view that judicial precedent is not a source of law. It is merely evidence of customary law. Savigny belongs to this school of thought. To quote Stobbe, "Practice is in itself not a source of law ; a court can depart from its formal practice and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required if there are better reasons for another treatment of the question of law".

Keeton rejects this view and holds that a judicial precedent is a source of law. To quote him, "A judicial precedent is a judicial decision to which authority has in some measure been attached. It must be noted at once, however, that partly because of the high status which judges occupy in political and social organization and partly because of the importance of the issues which they decide, judicial decisions have at all times enjoyed high authority as indications of the law". Again, "The English people have always looked to their judiciary as the fount of law and the courts have made it their province to ensure that that fount should never run dry. They have regarded law as a comprehensive whole, capable of

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1. Bentham paid the following tribute to the case-law in England : "Traverse the whole continent of Europe—ransack all the libraries belonging to the jurisprudential systems of the several political states, add the contents all together.....you would not be able to compose a collection of cases equal in variety, in amplitude, in clearness of statement....in a word, all points taken together, in instructiveness—to that which may be seen to be afforded by the collection of English reports of adjudged cases".

indefinite application to special cases and possessing the inherent quality of consistency. It is precisely this quality of consistency which has enabled English people to accept judge-made law without question as a natural element in English law." According to Thibaut, "If in any court a rule has been frequently and constantly followed as law, that court must follow these hitherto adopted rules as law, whether they relate to simple forms or to the substances to controversies, if they do not contradict the statutes, but yet only on the points on which the former judgements agreed. Co-ordinate courts do not bind each other with judgments but upper courts do bind the lower, so far as an earlier practice has not formed itself in the latter, and one ought not to treat the opinions of jurists as equal to the practice of the courts, although the former may, under certain circumstances, be of importance as authorities."

According to Dr. Cardozo, "In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether, I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. Perhaps the constitution of my own court has tended to accentuate this belief. We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law. Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." (Pp. 149-51, *The Nature of the Judicial Process*).

### **Nature of Precedent**

A precedent is purely constitutive and in no degree abrogative. This means that a judicial decision can make a law but cannot alter it. Where there is a settled rule of law, it is the duty of the judges to follow the same. They cannot substitute their opinions for the established rule of law. Their function is limited to supplying the vacancies of the legal system, filling up with new law the gaps that exist in the old and supplementing the imperfectly-developed body of legal doctrine.

### **Authority of Precedent**

The reason why a precedent is recognised is that a judicial decision is presumed to be correct. That which is delivered in judgment, must be taken for established truth. In all probability, it is true in fact and even if it is not, it is expedient that it should be held to be true. The practice of following precedents creates confidence in the minds of the litigants. Law becomes certain and known and that in itself is a great advantage. It is conducive to social development. Administration of justice becomes even-handed and fair. Decisions are given by judges who are experts in the study of law.

According to Jessel, M. R., "If I find a long course of decisions by inferior courts acquiesced which have become part of the settled law, I do not think it is the province of the Appeal Court after a long course of time to interfere, because most contracts have been regulated by those decisions. There is another consideration which always has weight with me. When the law is settled, it gets into the text-books which are a very considerable guide to practitioners." Again, "Where a series of decisions of inferior courts have put a construction on an Act of Parliament and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision and the practice of mankind in conducting their affairs."

According to Lord Loreburn, "I think this case falls within the rule that it is not necessary or advisable to disturb a fixed practice which has been long observed in regard to the disposition of property, even though it may have been disapproved at times by individual judges, where no real point of principle has been violated."

According to Lord Buckmaster, "Firstly, the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered, unless your lordships could say positively that it was wrong and productive of inconvenience. Secondly, decisions upon which title to property depends or which by establishing principles of construction or other-



wise form the basis of contracts, ought to receive the same protection. Thirdly, decisions that affect the general conduct of affairs so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue."

According to Dr. Julius Stone, "Precedent has played and will continue to play a most important part in common law judicial achievement. In the first place, precedents present for the instant case a rapid if incomplete review of social contacts comparable to the present, and of a rule thought suitable for those contexts by other minds after careful inquiry. In the second place, precedents serve to indicate what kind of result will be reached if a particular premiss or category is chosen for application in the instant case, and permit comparison with the results if some other premiss or category is adopted, either drawn from other cases, or judicially invented. In *Haseldine v. Daw* the common carrier cases gave the court a ready view of the results for the lift passenger if that analogy were followed, as well as of the context in which courts in the past had regarded such results as just for an injured plaintiff. The cases on occupiers of premises afforded another glimpse of other results deemed just in another context. But the court had still to make up its mind that it wished to reach one or other result, or some result quite different from either, in the context that was actually before it in *Haseldine v. Daw*. 'A good judge is one who is the master, not the slave, of the cases'." (P. 192, *The Province and Function of Law*).

### **Declaratory Theory of Precedents**

According to this theory, judges are merely law-finders and not law-makers. A judge does not make laws but merely discovers in the existing rules of law the particular principles that inform the facts of the individual cases.

According to Blackstone, "They (judges) are the depositories of the laws; the living oracles who must decide in all cases of doubt and who are bound by an oath to decide according to the law of the land. These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. For it is an established rule to abide by former precedents where the same points come again in litigation, as well as to keep the scales of justice even and steady and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments. A Judge is sworn to determine, not according to his own private judgments but according to the known

laws and customs of the land ; not delegated to pronounce a new law but to maintain and explain an old one."

According to Hale, "It is true the decisions of court of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attain, yet they do not make a law properly so called : for that only the King and Parliament can do ; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is ; specially when such decisions hold a consonancy and congruity with resolutions and decisions of former times."

According to Lord Esher, "There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply the existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable."

According to Dr. Carter, all judicial decisions merely declare the existing law. If no law existed and a judge decided a case before him, he was guilty of an indefensible outrage. However, if law did exist, then the judge did not create it and neither he nor the sovereign ratifying his decision could be said to be guilty of doing injustice to a party. To quote Carter, "If what the judges did was to declare a law not before existing, the subjection by them of one of the parties to liability for an infraction of the law in a transaction occurring before the existence of law would be an indefensible outrage."

According to Dr. Allen, "A man who chops a tree into logs has in a sense made the logs." The same applies to the judges who are the discoverers and not creators of law. According to Dean Pound, "Spurious interpretation while it is the chief means of growth in the formative period is an anachronism in an age of legislation. Ihering has called the process when applied in a period of growth by juristic speculation, juristic chemistry."

The declaratory theory of precedents has been condemned by Austin as "the childish fiction employed by our judges that judiciary or common law is not made by them but is a miraculous something made by nobody, existing from eternity and merely declared from time to time by the judges." According to Bentham, this theory is "a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not, openly claim it."

According to Munroe Smith, the fact that English common law has developed from scanty beginnings into its present dimensions and its rules have frequently been modified and overruled, is enough to show that judges not only maintain law but even create it. Courts also find fault with the view of Dr. Carter

who limits judicial decisions to mere declarations of existing law. The question is asked as to what he exactly means by the term "existing law." Does he mean that the range of law is limited and the judges have to select and apply the law actually suiting the case in hand? Does he mean that the range of law is infinite and offers ready-made solutions for every case that we can possibly think of? It is rightly pointed out by Bacon that "the narrow compass of human wisdom cannot take in all the cases which time may discover." If Carter defines the scope of law as unlimited, he is guilty of contradicting himself because he says that judicial decisions merely interpret the existing law and do not create any new law. To quote Carter again, "What is really done in a novel case is the same thing that is done in every disputed case. The features of the transaction are subject to scrutiny in order to determine to what class it belongs. The classes are not made; they exist in existing custom."

Critics also point out that in the field of equity, judges have not only been active in modifying, rationalizing and explaining common law rules but also in creating new laws at times. It is forgotten by the advocates of the declaratory theory that judges not only interpret the existing law but also expound new propositions of law.

### **Judges as law-makers<sup>1</sup>**

According to another theory, judges do not declare law but create new law. According to Prof. Dicey, "As all lawyers are aware, a large part and as many would add, the best part of the law of England is judge-made law—that is to say consists of rules to be quoted from the judgments of the courts. This portion of the law has not been created by Act of Parliament and is not recorded in Statute Book. It is the work of the courts; it is recorded in the Reports; it is in short the fruit of judicial legislation." According to Lord Bacon, "The narrow compass of human wisdom cannot take in all the cases which time may discover. There frequently arise novel cases or cases of first impression which the judge has to decide without the assistance of any pre-determined legal rule. The principles laid down by judges in such cases are bound to be a distinct contribution to the existing law." According to Prof. Gray, judges alone make the law. He supports his proposition by the following quotation from Bishop Hoadly: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes and not the persons who first wrote or spoke them." To quote Gray, "A fortiori, whoever hath an

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1. According to Mr. Justice Holmes, "Notwithstanding my great admiration for Mr. Bentham, I cannot but think that instead of blaming the judges for having legislated he should blame them for the narrow, timid and provincial manner in which they have legislated and for legislating under cover of vague and indeterminate phrase..."

absolute authority not only to interpret the law but to say what the law is, is truly the law-giver."

Critics point out certain limitations to the legislative powers of the judges. A statute cannot be overruled by a judge. It is his duty to enforce the same. Even if certain difficulties are experienced in its interpretation, it is the business of the legislator to remove them. The judge need not bother himself about the same. Authoritative precedents limit the power of a judge to create new law. He is not ordinarily allowed to depart from them. The facts of the case before him also put a limit on his law-making power. The ruling given by him applies only to the case before him. The observations made by him in the judgment do not have any binding authority. According to Allen, "The judge cannot, however much he may wish to do so, sweep away the prevailing rule of law and substitute something else in its place." According to Austin, "The judges in the absence of legislation impress rules of positive morality with the character of laws through decision of cases." According to Blackstone, the original theory is "a wilful falsehood having for its object the stealing of legislative power by and for hands which could not or durst not openly claim it."

It is to be observed that the above two theories regarding the role of the judges are not exclusive of each other. They are rather complimentary. The judge-made law is both original and declaratory. Judges not only declare the existing law but also create new law by their authoritative pronouncements.

According to Mr. Justice Holmes, "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think, the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

According to Dr. B. N. Cardozo, "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." (P. 141, *The Nature of the Judicial Process*). Again, "It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is

often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute." (Pp. 14-15, *Ibid*).

According to the same writer, "The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew. The process, with all its silent yet inevitable power, has been described by Mr. Henderson with singular felicity: 'When an adherent of a systematic faith is brought continuously in touch with influences and exposed to desires inconsistent with that faith, a process of unconscious cerebration may take place, by which a growing store of hostile mental inclinations may accumulate, strongly motivating action and decision, but seldom emerging clearly into consciousness. In the meantime the formulas of the old faith are retained and repeated by force of habit, until one day the realization comes that conduct and sympathies and fundamental desires have become so inconsistent with the logical framework that it must be discarded. Then begins the task of building up and rationalizing a new faith.'" (Pp. 178-179, *Ibid*).

### **Methods of Judicial Decisions**

There are two methods of judicial decisions: deductive and inductive. In the case of deductive method, the general legal rule is already fixed and certain and the same is applied in individual cases by the judges. The latter are not required to use their own brains. Their function is merely to apply the law which is already clearly laid down in the same way as a student of geometry uses the axioms. In the case of inductive method, the Judge has to start from a particular case and come to a general principle of law. The process is from the particular to the general. According to Allen, "In the one theory, antecedent decisions are helpful only as the illustrations of a general proposition; in the other, they are the very soil from which the general propositions must be mined."

There are certain defects in judicial legislation or precedent. In the first place, the decisions of the judges are not intelligible to the common man. Those are to be found in the law reports which are not accessible to the man in the street. It is not

possible for an ordinary individual to understand them and draw correct conclusions from them. Very often it is difficult to find out the *ratio decidendi* in a case. That requires a very high training of the mind. Although the people are bound by them and are liable to be punished if they disobey them, they, as a matter of fact, are not in a position to understand them without the help of competent lawyers.

Another defect of judicial precedents is that they create an atmosphere of uncertainty. Judges make law only when certain cases are brought before them and not otherwise. Moreover, a decision by one court may be reversed by another court. The result is that so long as a decision is not given by the highest court of the country, the law on the point is not settled and the atmosphere of uncertainty continues.

Natural justice demands that the law should be known before it is enforced. In the case of judicial legislation, what happens is that a case is brought before a court of law and then the decision is given by a judge. It is only when a decision is given that the law is laid down. It is obvious that when the act was actually done, the law had not been laid down. No wonder, the critics criticise the retrospectivity of operation of judicial legislation.

The view of Bentham was that these defects could be removed by means of the codification of law. Very many uncertainties of law could be removed by codifying law on a particular point. This could be done at regular intervals. However, during those intervals new precedents may be set up and thus create uncertainty. The view of Amos is that codification should be done after every 10 years. This may be a very good suggestion, but it is not certain how far the same can be actually adopted in practice. The labour and expenditure involved may be too much and no government may undertake such a thankless task.

### **Kinds of Precedents : (1) Authoritative and Persuasive**

According to Salmond, an authoritative precedent is one which judges must follow whether they approve of it or not. A persuasive precedent is one which the judges are under no obligation to follow but which they will take into consideration and to which they will attach great weight as it seems to them to deserve. Authoritative precedents are the legal sources of law and persuasive precedents are merely historical. Authoritative precedents establish law in pursuance of a definite rule of law which confers upon them that effect. If persuasive precedents succeed in establishing law at all, they do so indirectly by serving as the historical ground of some later authoritative precedent. They do not have any legal force or effect in themselves. The authoritative precedents must be followed by the judges whether they approve of them or not. The

persuasive precedents can merely persuade the judge but it is up to the judge to follow them or not.

The authoritative precedents in England are the decisions of the superior courts of justice. Examples of persuasive precedents are the foreign judgments, especially those of American courts, Canadian courts, Australian courts, Irish courts, etc., the decisions of superior court in other parts of the British Empire, the judgments of the Privy Council and the judicial dicta. To quote the Court of Appeal, "We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect and rejoice if we quite agree with it."

## **(2) Absolute and Conditional Precedents**

Authoritative precedents are of two kinds, absolute and conditional. In the case of absolutely authoritative precedents, they have to be followed by the judges even if they do not approve of them. They are entitled to implicit obedience. In the case of authoritative precedents having a conditional authority, the courts can disregard them under certain circumstances. Ordinarily, they are binding but under special circumstances, they can be disregarded. The court is entitled to do so if the decision is a wrong one. The decision must be contrary to law and reason. It is contrary to law when there is already in existence an established rule of law on the point and the decision does not follow it. When a law on a point is already settled, the only duty of the judge is to declare it and apply it. However, when the law is not settled, the judge can make law for the occasion. But while doing so, it is his duty to follow reason. Unreasonableness is one of the vices of a precedent. While overruling conditional authoritative precedents, the courts must not run the risk of making the law uncertain. Certainty of law is as important as justice itself. According to Lord Eldon, "It is better that the law should be certain than that every judge speculate upon importance of it."

A court of superior jurisdiction can overrule the decision of a subordinate court. A court of co-ordinate jurisdiction can simply dissent from another court. This means that the co-ordinate court can refuse to follow the precedent of another court and also lay down a different rule on the same point. The conflict between the two co-ordinate courts can be resolved only by a superior court. In the case of India, the decision of a single judge of a High Court is only a conditionally authoritative precedent. Another judge of the same High Court can differ from him. A Division Bench of the same High Court can overrule the same. There is a difference of opinion on the point whether a Full Bench of one High Court can overrule the decision of the Full Bench of another High Court. According to Beaumont, the decision of one Full Bench is as good as that of another as both of them

possess co-ordinate authority. The numerical superiority of a Full Bench does not entitle it to overrule the decision of another Full Bench. It is only the superior court that can overrule a decision of the Full Bench. Formerly that was the Privy Council and now it is the Supreme Court of India. According to the Madras High Court, a numerically stronger Full Bench can overrule the decision of a similar Full Bench.

The decisions of the House of Lords are absolutely binding on all the courts in England. Even the House of Lords itself is bound by its own decisions. The Court of Appeal is bound by its own decisions or by those of co-ordinate jurisdiction. There are *three exceptions* to this rule. If there are two conflicting decisions of a court, it must decide which of the two it should follow. If a decision of a court is in conflict with a decision of the House of Lords, it must refuse to follow it even if it is not expressly overruled by a decision of the House of Lords. The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incurium*." According to Warrington, L. J., "The conclusion I draw is that in order that a case may be treated as overruled, one must find either a decision of a superior court in question or an expression of opinion on the part of that court as a whole that such case was wrongly decided on its own facts and not merely that it ought not to be treated as an authority in a case arising out of different facts."

In the case of India, an inferior court is bound by the decisions of a superior court. A single judge of a High Court is bound by the decisions of a bench of two or more judges. A decision of the Full Bench of the same court is binding on a Bench consisting of two or more judges. Formerly, the decisions of the Privy Council and Federal Court were binding on all the courts in India. Now, the decisions of the Supreme Court of India are binding on all the courts in India.

### **(3) Declaratory and Original Precedents**

According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule. In the case of a declaratory precedent, the rule is applied because it is already law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same. An original precedent is an authority and source of new law but both original and declaratory precedents have their own value.



### **Stare Decisis**

The principle of Stare Decisis has been stated thus in Halsbury's Laws of England : " Apart from any question as to the courts being of co-ordinate jurisdiction, the decision which has been followed for a long period of time and has been acted upon by persons in the formation of contracts or in the disposition of their property, or in the general conduct of affairs, or in legal procedure, or in other ways, will generally be followed by courts of higher authorities than the court establishing the rule, even though the court before whom the matter arises afterwards might not have given the same decision had the question come before it originally. But the supreme appellate court will not shrink from over-ruling a decision or series of decisions, which establish a doctrine plainly outside the statute and outside the common law when no title and no contract will be shaken, no person can complain, and no general course of dealing can be altered by the remedy of a mistake."

The same principle has been defined thus in Corpus Juris Secundum : "Under the Stare Decisis rule, a principle of law which has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy and although generally it should be strictly adhered to by the courts, it is not universally applicable." It is also stated that "previous decisions should not be followed to the extent that grievous wrong may result, and accordingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous. The rule of Stare Decisis is not so imperative, or so inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the court and previous decisions shall not be followed to the extent that error may be perpetuated and grievous wrong may result."

The above-mentioned views have been accepted by the Supreme Court of India in *Maktul v. Mst: Manbahri* and others (1959 S.C.R. 1099)

### **Ratio Decidendi**

According to Salmond, "A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the Ratio Decidendi. The concrete decision is binding between the parties to it but it is the abstract Ratio Decidendi which alone has the force of law as regards the world at large."

Writers on jurisprudence have advanced different tests for ascertaining the ratio decidendi. Professor Wambaugh suggests that the ratio decidendi can be discovered by reversing the proposition of law put forward by the court and inquiring whether

the decision would be the same notwithstanding the reversal. If it is the same, then the proposition of law is no part of the ratio. Lord Simonds has pointed out defects in the suggestion. In cases where a judge has given two alternative grounds for a decision, the test of Professor Wambaugh would compel us to deny the case any ratio decidendi because whichever proposition was reversed the decision would still stand on the other.

Professor Goodhart points out that the ratio decidendi is not the reason for the decision because the reason may be bad and yet the case may come to be an authority. The ratio decidendi is also not necessarily the proposition of law stated in the judgment. There may be no rule of law expressly set out or there may be several rules of law set out by different judges as in appellate decisions. The rule may be broader than is necessary to cover the facts of the case before the court. The view of Goodhart is that ratio decidendi is nothing more than the decision based on the material facts of the case. There are certain rules by which the material facts can be discovered. Certain facts may be presumed to be immaterial unless expressly stated to be material. Such would be the facts regarding time, place, name, amount, etc. If the judgment does not give the facts, the facts stated in the report must be assumed to be material. If the judgment does state the facts, we must not look beyond that. The difficulty is as to how much of these facts the judge has treated as material. The view of Goodhart is that facts such as time, place, etc., are presumed to be immaterial unless expressly stated to be material. If the judgment does not distinguish between the material and immaterial facts, all facts mentioned in it must be considered to be material except facts regarding time, place, etc. All facts which the judge has expressly or impliedly treated as immaterial must be ignored. The ratio decidendi is the decision as applied to the material facts as ascertained according to the rules suggested by him. If in a later case, the material facts coincide with or are contained within the material facts of the earlier case, then the earlier case is a precedent in the point.

Critics point out that the view of Goodhart that a ratio decidendi of a case consists of the decision based on the material facts is superficially true. Its inadequacy becomes evident when it is applied in detail. It rests entirely on the meaning of the phrase "material facts." The theory of Goodhart implies that it is the deciding judge who decides what are the material facts and those can be discovered by a perusal of the judgment. The theory overlooks two points. The first point is that it is within the function of the judges in the subsequent cases to say what they choose to regard as the material facts of the earlier case. The second point is that two persons may agree to a collection of individual facts and yet form different impressions of the group of them as a unit. A case in law is a collection of facts. Where two cases resemble each other sufficiently so that one can be

regarded as a precedent for the other rests entirely on the impression which a particular judge forms of the facts of each case as a whole. According to M. R. Cohen, "You cannot pass from past decisions to future ones without making assumptions. From the statement that a court has ruled so and so in certain cases nothing follows except in so far as the new cases are assumed to be like the old cases. But this likeness depends on our logical analysis of classes of cases." The result is that the *ratio decidendi* of a case depends a good deal on what later Tribunals have declared to be the *ratio decidendi*.

### **Obiter Dictum**

All that is said by the court by the way or the statements of law which go beyond the requirements of the particular case and which lay down a rule that is irrelevant or unnecessary for the purpose in hand, are called *Obiter Dicta*. These *Dicta* have the force of persuasive precedents only. The judges are not bound to follow them. They can take advantage of them but they are not bound to follow them. *Obiter Dicta* help in the growth of law. These sometimes help the cause of the reform of law. The judges are expected to know the law and their observations are bound to carry weight with the government. The defects in the legal system can be pointed out in these *Obiter Dicta*. The judges are not bound to make their observations on a particular point unless that is strictly relevant to the point in issue but if they feel that they must speak out their own minds on a particular point, the public should be grateful to them for their labour of love.

According to Lord Sterndale, "*Dicta* are of different kinds and of varying degrees of weight. Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case, and is not really present to the judge's mind. Such *dicta*, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some *dicta*, however, are of a different kind; they are, although not necessary for the decision of the case, deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open, no doubt, to other judges to give decisions contrary to such *dicta*, but much greater weight attaches to them than to the former class."

According to Allen, "It is remarkable how sometimes a *dictum* which is really based on authority, or perhaps on a fallacious interpretation of authority, acquires a spurious importance and becomes inveterate by sheer repetition in judgments and textbooks. Nobody has ever discovered the origin of Lord Abinger's dogma in *Priestly v. Fowler* (1837), 3 M. & W.1, which remained for more than a century the basis of the whole irrational and unjust law of common employment, and finally had to be uprooted by legislation. Sixty-eight years passed before the House of Lords

held in *United Australia, Ltd. v. Barclay's Bank Ltd.* (1941) A.C.1. that a supposed rule (and an extremely inconvenient one) lay down by Bowill C. J. in *Smith v. Baker*, (1873) L.R. 8 C.P. 350 was not a rule at all, but a mere dictum based on a misunderstanding of *Buckland v. Johnson* (1854), 15 C.B. 145. Dicta of Kennedy L. J., in *Hillyer v. St. Bartholomew's Hospital*, (1909) 2 K.B. 820 purported to lay down in wide terms a principle of the greatest importance in the liability of hospitals to their patients, and it was not until the decision in *Gold v. Essex County Council* (1942) 2 K.B. 293 that the mischief of this dictum was restrained to a more reasonable principle.

"The whole position with regard to dicta has undoubtedly become confused, and, as authorities multiply, it is increasingly difficult to determine what is *essential* and what is merely *incidental* to a decision. We hear more and more protests from the Bench against the citation of dicta for what they do not decide; but those whose duty it is to assist the court with the best material which they can find should not be blamed too severely if, in the present state of our authorities, they sometimes discover mare's nests. And indeed, in some important branches of the law, it is not easy for anybody to know what is authoritative and what is not. At this time of writing, the whole law relating to landlords, tenants, and guests has got itself into a most intricate tangle of artificial distinctions, which nobody can really believe to effect substantial justice in the claims constantly arising in this commonplace relationship. At one time *Miller v. Hancock*, (1893) 2 Q. B. 177 was a notorious stumbling block, until it was so often kicked aside that it perished by sheer attrition. Today *Fairman v. Perpetual Investment Building Society*, (1923) A. C. 74 is probably the case in this no Man's Land which causes most doubt and anxiety, chiefly because it defeats ingenuity to determine whether half that was said in that case was *ratio* or *dictum*. It may be that some day Fairman's case will go the same way as *Miller v. Hancock*, but meanwhile all that can be said with certainty is that the prospects of every litigant in this branch of the law are highly uncertain, and will continue to be so until some consistent principle of civil liability emerges into the light of day from the dense forests of invitees licensees and trespasses, where the trees flourish but the wood is dim to the view. A similar darkness hangs over the responsibility of an occupier to an invitee for the negligence of an independent contractor. We certainly seem to have reached the extreme of obfuscation when a single judge, attempting to thread his way through a labyrinth, says that expressions of a higher court were obiter and therefore not binding, and is then told by the higher court that his criticisms were themselves obiter, and both are told by a learned commentator that the criticism of the criticism was obiter. Hard indeed will be the lot of Bench and Bar who in the future will have to dissect into *ratio* and *dictum* the three cases (with many others which they touch at one point or another) of *Picka-*

vance v. P., (1901) P. 60, Hopkins v. H, (1914) P. 282, and Land v. L., (1949) P. 405. The last-mentioned case appears to lay down that however weighty a dictum may seem to be, if in the opinion of the Court it has been misinterpreted in subsequent cases, those cases are of no authority. This seems to add the last refinement to the process of judicial ordeal-by-dictum.

"A judgment, as we have seen, is made up of many different elements and, in our law, it has no uniform pattern, since it is the product of an individual mind and personality. It is therefore impossible to devise any rule of thumb which can distinguish automatically between ratio and dictum. The very process of distinguishing is seldom wholly impartial, since there is a natural tendency to regard as essential that which one happens to agree and to discard as irrelevant or erroneous that with which one disagrees. There is no machine to separate the cream from the milk of the word; but in this vexed question there are a few guiding principles to keep in view."

### **Decision on Authority and Decision on Principle**

Only that precedent is binding on a court which is on all fours with the case before it. If the facts in both cases are the same, the decision is said to be on authority. If the facts of the case are different and the judge merely acts on the analogy of a previous rule, he expounds a new principle of law and his decision is said to be on principle.

### **Disregard of Precedent**

It has already been pointed out that a precedent of conditional authority can be disregarded when it is opposed to a well-recognized existing rule of law or when it is opposed to reason. In both these cases, only a short period should have elapsed since the precedent was set up. If a long time has passed since the precedent was set up, the circumstances may have changed so much that it is not proper and just to retain the precedent. It may also be in the interest of justice to disregard the precedent. It is obvious that a precedent gains in authority with an age. If the people have followed a particular precedent for a long time, it is unfair and inexpedient to depart from the same. Even if a precedent is wrong, it may have been followed in a very large number of cases and it may not be desirable to disappoint innumerable parties who may have followed it. This rule is known as the rule of *Stare Decisis*. It is rightly pointed out that common errors make law (*Communis Error Facit Jus*). If an error has persisted for a long time and people have believed in it, it should be upheld as law. However, if circumstances have changed on account of the lapse of time, it may not be proper and expedient to enforce an old precedent which may be out of touch with the needs of the people. Under the circumstances, it is advisable to evolve a new law. We should follow the principle that "with the ceasing of the reason for the rule, the rule itself ceases". (*Cessante Ratione Cessat Lex Ipsa*).

According to Salmond, "A moderate lapse of time will give added vigour to a precedent but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the intelligent and perhaps partially forgotten principle with later decisions. The tooth of time will eat away an ancient precedent and greatly deprive it of all authority. The law becomes animated by a different spirit and assumes a different course and the older decision become obsolete and inoperative."

### **Precedent & Legal Development**

Sometimes it is desirable to alter the precedent in the light of changed circumstances. This can be done in many ways. The judicial power of granting new remedies may be used to realize the objective, but this method is not approved by all. Another method is the moulding of different and often scattered legal rules or remedies into a broad and comprehensive principle which combines restatement, remoulding and the making of new law. An outstanding example is the rule in *Rylands v. Fletcher*. It collected several cases of liability without fault which "wandered about, unhoused and unshepherded, except for a casual attention, in the pathless fields of jurisprudence, until they were met by the master mind of Blackburn J., who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category". The same has been done by the decision in *Donoghue v. Stevenson* in another field.

Though a long-established rule, even if not formally binding on the court, will not lightly be upset, this consideration will be over ruled where demands of justice are felt to the weightier. The House of Lords in *Fibrosa* case (1943 A. C. 32) did not feel deterred by the fact that the rule in *Chandler v. Webster* was 40 years old, from over ruling it. However, where the House of Lords itself has spoken before, the way for non-legislative reform may be barred. Although the doctrine of common employment is generally found irksome and although the courts have whittled it down to a considerable extent, they have felt unable to abolish it.

The irksome effect of binding precedent no longer in accordance with current legal ideals can, to some extent, be over-come by the technique of either ignoring or distinguishing precedent. The possibilities and the limitations of moulding the law in the light of changing legal ideals are well illustrated by the changes in the doctrine of common employment. This doctrine was introduced into the common law as a result of a "prejudiced and one-sided notion on what was called public policy", of social ideals now repudiated by legislative reforms and current public opinion. Various judgments in recent times demonstrate the strong aversion of present day judges against a doctrine so much at variance with modern social ideals. However, the House of Lords has not decided to abolish a rule based on industrial and social conditions

which have changed and to do justice under new and changing conditions because "in a matter of clear and precise decision such as the doctrine of common employment, it is well settled that the decision of the House is final and that the rule can only be changed by the legislature" (Lord Wright). However, if abolition has proved impossible, the courts have been able to restrict the scope of the doctrine to a remarkable extent.

In recent years, there has been a partial but open departure from the strict rule of *stare decisis* on a lower level. Both the Court of Appeal and the Court of Criminal Appeal in England have substantially modified their attitude in regard to *stare decisis*. In 1944, the Court of Appeal held that the court is entitled and bound to decide which of the two conflicting decisions of its own it will follow. The Court is bound to refuse to follow a decision of its own which, though not expressly over-ruled, cannot, in its opinion, stand with a decision of the House of Lords. The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*. According to Lord Greene M. R., "Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction—in such a case a subsequent court must decide which of the two decisions it ought to follow; and those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such case a subsequent court is bound by the decision of the House of Lords."

In 1950, the full Court of Criminal Appeal over-ruled an earlier decision of its own of 1939 on a question of bigamy. Lord Goddard C. J., observed thus: "This court. . . . has to deal with questions involving the liberty of the subject, and if it finds, on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and that, on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the court to reconsider the earlier decision with a view to seeing whether that person has been properly convicted. The exceptions which apply in civil cases ought not to be the only ones applied in such a case as the present. . . ."

### Sources of Judicial Principles

Sometimes the question arises as to how the course of law supplements the existing law by laying down new judicial principles. When there is no authority or rule of law to guide the judges, they look to persuasive sources of law for guidance. Although these sources have no legal authority, they are considered with great respect. Reference is made to foreign law, opinions of distinguished jurists and lawyers and the obiter dicta of the judges. Commonsense is also employed to arrive at a decision. Sometimes

analogies are drawn from the existing law to arrive at the new rules.

### Functions of Judges and Jury

Generally speaking, all questions of law are decided by the judges and all questions of fact are decided by the jury. It is the duty of the judge to explain the law on the point to the members of the jury. It is only then that the members of the jury can be expected to return a correct verdict. All questions of law have to be elucidated by the judge. It is for him to decide whether a particular evidence is permissible or not. However, the evidence has to be weighed by the members of the jury alone. The jury decides questions of fact which do not admit of any principles. The jury does not lay down any principles of law. It is merely concerned with concrete cases. According to Salmond, the jury decides in concreto, not in abstracto but the judge strives after the general and the abstract. The decision of a judge can form a precedent but not the verdict of a jury.

According to Dias and Hughes, "The future of the doctrine of precedent in England is a matter of utter conjecture. It is sometimes asserted that the bulk of reported case law is now becoming so unmanageable that the doctrine of *stare decisis* cannot operate effectively for very much longer. The physical labour of discovering all the relevant authorities on a given point, and of keeping up with the annually fresh case law on a topic will become intolerable. Professor Goodhart has pointed out that the position is infinitely worse in America, where the lawyer can expect an annual output of reported cases of some three hundred and fifty volumes. The modest handful of English Reports seems less frightening when compared with this teeming profusion. But the difficulty is less acute in America, since the doctrine of *stare decisis* operates there with far less strictness than it does in England. Professor Goodhart indeed suggests that the English lawyer can very well manage with a working library of some six hundred volumes, which he does not consider excessive, but this seems to be a view more appropriate to the freedom of the academic library and the study than to the everyday life of the working lawyer. Sir Carleton Allen has demonstrated the growing frequency of the overlooking of relevant, sometimes vital, authorities by the courts in coming to decisions. This must be due to the multiplication of authorities, and it is a phenomenon which, if it grows, will bring the whole doctrine of *stare decisis* into disrepute. That doctrine can only function with dignity and effect if there is something approaching a guarantee that all relevant cases will be brought to the notice of the courts. This practice is clearly impossible in the work of the magistrates and county courts, and it is therefore necessary to inquire whether the whole theory of precedent is in modern conditions the most effective way of developing English law in the appellate courts. But this a tonic which cannot be dis-



cussed until the alternative to precedent is examined. That alternative is the codification of English law with a provision depriving all decisions before the code of any binding effect."

### **Suggested Readings**

<b>Allen</b>	<b>Law in the Making.</b>
<b>Cardozo</b>	<b>The Nature of the Judicial Process.</b>
<b>Cardozo</b>	<b>The Paradoxes of Legal Science.</b>
<b>Dickinson, J.</b>	<b>Administrative Justice and the Supremacy of Law.</b>
<b>Goodhart</b>	<b>Essays in Jurisprudence and the Common Law.</b>
<b>Hall</b>	<b>Readings in Jurisprudence.</b>
<b>Kiralfy</b>	<b>The English Legal System.</b>
<b>Lauterpacht, H.</b>	<b>Function of Law in the International Community.</b>
<b>Llewellyn</b>	<b>The Bramble Bush.</b>

## CHAPTER X

### CUSTOM

#### Definition

Custom is also an important source of law and it is desirable to define the same. According to Salmond, custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. According to Keeton, customary law may be defined as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as sources of law because they are generally followed by the political society as a whole or by some part of it. According to Carter, "The simplest definition of custom is that it is the uniformity of conduct of all persons under like circumstances." According to Holland, custom is a generally observed course of conduct. The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common: one man crosses the common in the direction which is suggested either by the purpose he has in view or by mere accident. If others follow in the same track—which they are likely to do after it has once been trodden—a path is made. According to Austin, custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior. According to Allen, custom as a legal and social phenomenon grows up by forces inherent in society, forces partly of reason and necessity and partly of suggestion and limitation. According to Halsbury, a custom is a particular rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. The Judicial Committee of the Privy Council has defined custom as a rule which in a particular family or in a particular district has from long usage obtained the force of law.

#### Origin of Custom

Custom is the oldest form of law-making. A study of the ancient law shows that in primitive society, the lives of the people were regulated by customs which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others.

When the same thing was done again and again in a particular way, it assumed the form of custom. Holland rightly points out that custom originated in the conscious choice by the people of the more convenient of the two acts. Imitation

also must have played an important part in the growth of customs.

According to Maine, "The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development which ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that *usage which is reasonable generates usage which is unreasonable*. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it."

According to Bagshot, "The most intellectual of men are moved quite as much by circumstances which they are used to as by their own will. The active voluntary part of a man is very small, and if it were not economized by a sleepy kind of habit, its results would be nil. We could not do every day out of our own heads all we have to do. We should accomplish nothing, for all our energies would be frittered away in minor attempts at petty improvements. One man, too, would go off from the known track in one direction, and one in another; so that when a crisis came requiring massed combination, no two men would be near enough to act together. It is the dull traditional habit of mankind that guides most men's actions, and is the steady frame in which each new artist must set the picture that he paints. And all this traditional part of human nature is, *ex vi termini*, most easily impressed and acted on by that which is handed down." According to Tarde, imitation is not mere curiosity of psychology, it is one of the primary laws of nature. Nature perpetuates itself by repetition and the three fundamental forms of repetition are rhythm or undulation, generation and imitation.

According to Vinogradoff, "Social customs themselves obviously did not take their origin from an assembly or tribunal. They grew up by gradual process in the households and daily relations of the clans, and the magistrate only came in at a later stage, when the custom was already in operation, and added to the sanction of general recognition the express formulation of

judicial and expert authority.” (Historical Jurisprudence).

A study of ancient society shows that law-making was not the business of the kings. Law of the country was to be found in the customs of the people. The people were accustomed to a particular way of living and doing things and that was to be found in the customs of society. The king was anxious to rule the people according to the popular notions of right and wrong and those were to be found in their customs. Later on, the same custom was recognised by the sovereign by putting his imprimatur on it. It was in this way that custom was transformed into law. Custom was vague in the beginning but it became definite and concrete with the passage of time. It became a rule of law when it was recognised by the sovereign. Sometimes, it was adopted by the legislature in its enactments. Sometimes, it was recognised by the courts in their decisions. The judicial decisions on Hindu law are based on the customs of the Hindus. Custom is considered as transcendental law. According to Salmond, the importance of custom diminishes as the legal system grows. In countries like England, it has been almost entirely superseded by legislation and precedent. Even the common law of England was originally based on the customs of the country. The travelling judges went from place to place to try cases and based their decisions on the customs prevailing in various parts of the country. As they gave similar decisions in similar cases in all parts of the country, a law common to the whole country came into existence and this came to be known as the common law. It is true that the common law of England grew out of the decisions given by the travelling judges but the decisions of the travelling judges were originally based on the customs of the country.

According to Ancel, “Writers are in the habit of giving their own interpretations of the law, which are sometimes contrary to the solutions of the courts, but which they nevertheless consider as the only real expression of French Law. On many important points...there exists a doctrine of the courts and a doctrine of law writers. So you can find in France a law which is printed in books and taught in universities, and which yet differs much from, even when not contrary to, the law applied by the courts of justice. Writers nowadays take care to state not only their own opinion, but also the opinion of the jurisprudence, but yet they put forward their solution as the only legal one.”

### **Binding Force of Custom**

There are many reasons why custom is given the force of law. (1) Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of truth, justice and public policy. The very fact that any rule has the sanction of custom raises a presumption that it deserves the sanction of law also. Judges are inclined to

accept those rules which have in their favour the prestige and authority of long acceptance. Custom is the external and visible sign of the national conscience and as such is accepted by the courts of law as an authoritative guide. To quote Salmond, "Custom is to society what law is to the state. Each is the expression and realisation of the measure of man's insight and ability, of the principles of right and justice. The law embodies those principles as they commend themselves to the incorporate community in the exercise of its sovereign power. Custom embodies them as acknowledged and approved, not by the power of the state, but by the public opinion of the society at large."

(2) Another reason for the binding force of custom is that the existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated. The observance of a custom may not be ideally just and reasonable, but it cannot be denied that it brings stability and certainty in the legal order. In the case of California, the customs which developed on the gold fields regarding the regulation of mining industry, were later on given the authority of law by the legislature. In the case of New Zealand, the customs of the Maoris, the original inhabitants of the country, were recognised by the Native Rights Act of 1865 which provided thus: "Every title to or interest in land over which the native title has not been extinguished shall be determined according to the ancient custom and usage of the Maori people so far as the same can be ascertained."

(3) Sometimes a custom is observed by a large number of persons in society and in course of time the same comes to have the force of law. Reference may be made in this connection to the custom of giving three days of grace on bills of exchange.

(4) Custom rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

(5) According to Paton, "Custom is useful to the law-giver and codifier in two ways. It provides the material out of which the law can be fashioned—it is too great an intellectual effort to create law *de novo*. Psychologically, it is easier to secure reverence for a code if it claims to be based on customs immemorially observed and themselves true even though historically the claim cannot be substantiated. There is inevitably a tendency to adopt the maxim 'whatever has been authority in the past is a safe guide for the future'."

### **Theories regarding Transformation of Custom into Law**

There are two theories regarding the question as to when

a custom is transformed into law. Those are the historical theory and analytical theory.

### **(1) Historical Theory**

According to the historical theory, the growth of law does not depend upon the arbitrary will of any individual. It does not depend upon any accident. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. Savigny gives it the name of *Volkgeist*. To quote Savigny, "Law like language stands in organic connection with nature or character of the people and evolves with the people."

According to Puchta, custom is not only self-sufficient and independent of state imprimatur but is a condition to all sound legislation. According to Arndt, "Customary law contains the ground of its validity in itself. It is law by virtue of its own nature, as an expression of the general consciousness of right, not by virtue of the sanction, express or tacit, of any legislature."

The historical theory has been criticised by many writers. According to Paton, the growth of most of the customs is not the result of any conscious thought but of tentative practice. According to Gray, "Not only does custom play a small part at the present day as a source of non-contractual law, but it is doubtful if it ever did, doubtful whether, at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated legal rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions and that the latter have served to give expression to the former but of this there appears to be little proof. It seems at least as probable that custom arose from legal decisions." According to Jethrow Brown, "That custom is often posterior to judicial decision is another fact about which no difference of opinion is possible. Under the pretence of declaring custom, judges frequently give rise to it." According to Allen, all customs cannot be attributed to the common consciousness of the people. In many cases, customs have arisen on account of the convenience of the ruling class. According to Sir Henry Maine, "Custom is a conception posterior to that of Themistes or judgments." Themistes were the awards which were dictated to the King by the Greek goddess of justice. It is later on that custom came into existence.

### **(2) Analytical Theory**

The great advocates of the analytical theory are Austin, Holland, Gray, Allen and Vinogradoff. According to Austin, custom is a source of law and not law itself. Customs are not positive laws until their existence is recognized by the decisions

of the courts. A custom becomes law when it is embodied in an Act of the legislature. It becomes law when it is enforced by the state. It is not every custom that is binding. Only those customs are valid which satisfy the judicial test. The sovereign can abolish a custom. A custom is law only because the sovereign allows it to be so.

According to Holland, customs are not laws when they arise but they are largely adopted into laws by state recognition. English courts require that not only the existence of a custom be proved but it should also be proved that the same is reasonable. The legislature can also abrogate customs whether partially or wholly. To quote Holland, "Binding authority has thus been conceded to custom, provided it fulfils certain requirements the nature of which has also long since been settled and provided it is not superseded by law of a higher authority. When, therefore, a given set of circumstances is brought into court and the court decides upon them by bringing them within the operation of a custom, the court appeals to that custom as it might to any other pre-existent law. It does not *proprio motu* then for the first time make that custom a law; it merely decides as a fact that there exists a legal custom about which there might up to that moment have been some question, as there might about the interpretation of an Act of Parliament."

According to Gray, "The true view, as I submit is that the law is what the judges declare; that statute, precedents, the opinions of the learned experts, customs and morality are the source of the law; that at the back of everything lies the opinions of the ruling spirits of the community who have the power to close any of the sources; but that so long as they do not interfere, the judges in establishing law have recourse to these sources. Custom is one of them, but to make it not only one source but the sole source of law itself, requires a theory which is as little to be trusted as that of Austin."

The analytical theory has been criticised by Allen in these words: "Custom grows by conduct and it is therefore a mistake to measure its validity solely by the element of express sanction accorded by courts of law or by other determinate authority. The characteristic feature of the great majority of customs is that they are essentially non-litigious in origin. They arise from any conflict of right adjusted by a supreme arbiter, not from any claim of 'meum' against 'tuum', but from practices prompted by the convenience of the society and of the individual, so far as they are prompted by any conscious purpose at all. The starting point of all custom is convention rather than conflict, just as the starting point of all society is co-operation rather than dissension." According to Vinogradoff, "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social

co-operation. Neither succession nor property, nor possession nor contract, started from direct legislation or from direct conflict. Succession has its roots in the necessary arrangements of the household on the death of its manager; property began with occupation; possession is reducible to *de facto* detentions; the origins of contract go back to the customs of barter."

### **Kinds of Customs : Legal**

Customs are of two kinds, legal and conventional. The *legal custom* is one whose legal authority is absolute. It possesses the force of law *proprio vigore*. The parties affected may agree to a legal custom or not but they are bound by the same. Legal customs are of two kinds, local customs and general customs. Local customs apply only to a locality and a general custom applies to the whole country.

### **Conventional Custom or Usage**

A conventional custom is one whose authority is conditional on its acceptance and incorporation in the agreement between the parties to be bound by it. A conventional custom is an established practice which is legally binding because it has been expressly or impliedly incorporated in a contract between the parties concerned. When two parties enter into an agreement, they do not put down in black and white all the terms of the contract. There are certain implied terms which can be omitted. The expressed terms of the contract are merely its framework or skeleton. The contract becomes complete only when we take into consideration the implied terms. The intention of the parties to the contract can be gathered from the customary law and other things which can reasonably be taken to be implied in the contract. The customs of the locality or trade or profession are taken to be included in the contract. The courts are bound to take notice of these customs.

In the case of *Hutton v. Warren*, the Court of Exchequer Chamber held that a lease of agricultural land must be read subject to the custom of the locality that the tenant was bound to observe a certain course of husbandry and that he was entitled to an allowance for seed and labour on quitting the land. Baron Parke has observed thus: "It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. . . . This has been done upon the principle of presumption that, in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to these known usages".

Certain conditions must be satisfied before a court is entitled to incorporate the usages into contracts. The usage must be so well-established as to be notorious. This is necessary because



without notoriety, it will be impossible to show that both parties were contracting in the light of the usage. Another condition is that the usage cannot alter the general law of the land, whether statutory or common law. The reason is that usage derives its force from its incorporation into an agreement and can have no power to alter the law than an express agreement. Another condition is that the usage must be reasonable. A custom or usage will not be enforced in a particular case if it purports to nullify or vary the express terms of the contract. The sole function of such usages is to imply the terms when the contract is silent. The parties cannot be understood to have contracted in the light of a convention which they have expressly contradicted. To quote Lord Birkenhead: "The learned Judge has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter".

There is a process by which conventional usage comes to have the force of law. To begin with, when a usage begins to emerge, the court will not take notice of it unless it is expressly provided in each case. However, in the course of time, the usage becomes sufficiently notorious before the courts for them to dispense with proof in the particular case and to take judicial notice of it. At this stage, the usage already acquires the character of settled law. Later on, the legislature may wish to codify or enact upon the particular branch of law in which this body of usage occurs. The enactment normally takes the form of a statement of law as it is found in the decisions of the courts. This process has actually been employed in the case of the Bills of Exchange Act, the Marine Insurance Act and the Sale of Goods Act.

### **Local Custom**

Local custom is one which prevails in some definite locality and constitutes a source of law for that place only. The following passage from Coke's translation of Littleton's *Tenures* shows that local customs have the force of law: "For the greater part such boroughs have diverse customs and usages which be not had in other towns. For some boroughs have such a custom that if a man have issue many sons and dieth, the youngest son shall inherit all the tenements which were his father's within the same borough, as heir unto his father by force of the custom; the which is called Borough English. Also in some boroughs by the custom the wife shall have for her dower all the tenements which were her husband's. Also in some boroughs by the custom a man may devise by his testament his lands and tenements".

Every local custom must satisfy certain conditions. It must be reasonable. It must conform to the statute law. It must have been observed as obligatory. It must be of immemorial antiquity.

According to Dias and Hughes, "The part that local custom plays in the modern law is not great. The number of local customs which have not yet come before the courts for adjudication must now be small....Undeniably custom has provided the material for certain judicial decisions and it is certainly a source in this sense. Whether we ought to go further and regard it as a binding source is not easy to say. The equivocal attitude of the courts in this matter poses a problem which is incapable of a tidy solution, and it is this that creates the doubt. The judges tell us on the one hand that they are bound by custom, and this derives considerable support from the fact that local customs are essentially derogations from the common law, from which judges do not normally deviate unless compelled to do so. On the other hand, their unlimited discretion in throwing out customs which they regard as unreasonable or as contravening some fundamental principle of the common law belies their words. They appear to be throwing a smoke-screen around their activities. It is impossible to say beforehand whether a judge will follow a given custom or not, yet once he has decided to follow it he says that he does so because he is bound by it. This point was perceived in an article written by Jethrow Brown as long as 1905, who observed that the contention that the courts are bound by customs is drawn solely from the language of the judges. 'What judges do', he writes, 'and what they profess to do are not always the same, and the latter is only evidence of the former, very often very misleading evidence.'

"Now, there is something behind this verbal facade: judges say they are bound because they feel bound. It is suggested that this feeling is the heritage of a bygone age when judges felt bound because in very truth they were bound. Since then, the respect for custom has been perpetuated in the language of the cases and repeated in books, and has been thus carried even into the present time when judges have in fact outgrown its binding influence. The power of custom to influence judges has become less and less potent with the passage of time. We live in the day of a legislative machine which exercises an increasingly detailed control over the daily affairs of life, leaving an always diminishing field for the operation of custom. We must not overlook, however, the historical fact that the early revolutions of our political and social organisation were achieved through the silent operation of custom and not through the express methods of legislation and judicial decision. Professor Plucknett has pointed out the flexibility of mediaeval custom, how it could rapidly adapt itself to the changing needs of society and achieve social revolutions by a speedy process of modification. The advent of feudalism in England reveals the speedy growth of a new body of customary law, administered by the new feudal courts as opposed to the older communal courts. The decline of feudalism witnesses the same process." (Pp. 41—3, Jurisprudence).

### General Custom

A general custom is that which prevails throughout the country and constitutes one of the sources of the law of the land. There was a time when common law was considered to be the same as the general custom of the realm followed from ancient times. To quote, "The common law of the realm is the common custom of the realm." This view held the field up to the end of the 18th century. However, it cannot be denied that it is incorrect to regard common law as the embodiment of the general custom of the land. No doubt, common law is partly based on the customs of England as the travelling judges adopted some of the local customs in their decisions, but they also used their own discretion in taking help from natural law, canon law and the principles of Roman civil law.

There is no unanimity of opinion on the point whether the general custom must be immemorial or not. According to one decision, a recent trade usage treating debentures payable to bearer cannot be recognized as it is against the common law. In another case, it has been held that an instrument which is transferable by delivery under a trade usage, though recently developed, is a negotiable instrument. If we insist that a general custom must be immemorial, the result is that once such a custom is recognized by a court of law, it cannot be changed or abrogated by a new custom and thus the growth of customary law is checked. The general custom which forms a part of the law merchant prevents new trade customs of a general nature from developing.

The view of Salmond is that the general custom must be immemorial. It is true that trade-customs of a comparatively recent growth are occasionally recognized by the courts, but those are exceptions only. The general rule is that a general custom cannot have the force of law unless and until it is also immemorial. According to Parker, when a general custom is adopted as a precedent, it is accepted as a form of conventional law. It is adopted because common law provides that an agreement should be enforced according to its terms. A general custom, once recognized, cannot be set aside by a later general custom. A new general trade-custom cannot derogate from an earlier custom but can develop or add to it. A general trade cannot become law if it conflicts with law.

According to Keeton, a general custom must satisfy certain conditions if it is to be a source of law. It must be reasonable. It must be generally followed and accepted as binding. It must have existed from immemorial times. It must not conflict with the statute law of the country. It should not conflict custom with the common law of the country.

### Requisites of a Valid Custom

- (1) A custom to be valid must be proved to be *immemorial*.

According to Blackstone, "A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom." According to Littleton, "No custom is to be allowed but such custom as hath been used by title of prescription, that is to say, from time out of mind." The idea of immemorial custom was derived by the law of England from the canon law and by the canon law from the civil law. English law places a limit to legal memory and fixes 1189 A. D. as enough to constitute the antiquity of a custom. Undoubtedly, the year 1189 is an arbitrary limit. If we can trace back a certain custom as being prevalent from 1189 without interruption, the validity of a custom is established. It is to be observed that in the case of India, the English law regarding legal memory is not applied. All that is required to be proved is that the alleged custom is ancient.

(2) Another essential of a valid custom is that it must be *reasonable*. It must be useful and convenient to the society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. To ascertain the reasonableness of a custom, it must be traced back to the time of its origin. The unreasonableness of a custom must be so great that its enforcement results in greater harm than if there were no custom at all. The by-laws in England are required to satisfy the test of reasonableness. If they are not reasonable, they are set aside by the courts. Where the courts find a custom in existence which, either by aberration or by change in law, since its origin, not merely differs from but directly conflicts with an essential legal principle (including the principle of public policy), these have power in modern communities to put an end to the custom. In short, custom, once indisputably proved, is law, but the courts are empowered, on sufficient reason, to change the law which it embodies. According to Prof. Allen, the unreasonableness of the custom must be proved and not its reasonableness.

According to Trevor G. J., "It cannot be said that a custom is founded on reason, though an unreasonable custom is void : for no reason, even the highest whatsoever, would make a custom or law ; so it is no particular reason that makes any custom law, but the usage and practice itself, without regard had to any reason of such usage."

According to Allen, "Examination of the numerous cases in points leads to the conclusion that the 'fundamental principles of right and wrong' upon which courts have held customs to be unreasonable, resolve themselves broadly into the following state of circumstances :

"1. On the facts of many cases, the question whether or not

a custom is reasonable is indistinguishable from the question whether there is any evidence to go to the jury of its existence. Frequently, the two aspects of the matter are treated as inseparable. This is true when the custom or usage in question is alleged to be actually observed at the present time ; it is also true when the courts have to determine whether a custom proved to have existed for some time past possesses the quality of immemorial antiquity. Its very nature, as alleged, may show that it cannot really have existed in the social and economic conditions of a distant age. Thus in *Bryant v. Foot* (1868), L. R. 3 Q. B. 497, the rector of a parish claimed that by custom a fee of 13s. was payable on the celebration of every marriage in the parish. The fee was shown to have been customary for forty-eight years, and it was argued that this raised a presumption of immemorial antiquity. But the Court, being at liberty to draw inferences of fact, had no difficulty in holding that in the reign of Richard I this fee would have been grossly unreasonable according to the value of money in the Middle Ages. Here it is plain that the Court was really deciding that in the reign of Richard I the alleged custom did not in fact exist.

"2. Sometimes the term 'unreasonable' is used of a custom which is found to be contrary to statute or to a fundamental rule of Common Law. In such a case it is really 'illegal' rather than unreasonable, and, as we have seen, is inadmissible.

"3. A custom must be notorious, and cannot avail against a party who did not know, could not be expected to know, and was under no duty to know of its existence. The courts constantly have to guard against the insinuation of usage into contracts for the benefit of one party only, especially in commercial causes. Customs of trade', says Brett J., 'as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the courts, of some rule of law to business, and which application has seemed irksome to some merchants. . . . When considerable numbers of men of business carry one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom ; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person ignorant of it, is unreasonable, contrary to law, and void'. What is said of commercial usage (in which, however, this question most often arises) is true of all customs ; hence the rule, already noted, that customs are to be regarded as requiring strict proof. A custom may be one-sided for the following reasons, aptly tabulated in Comyns' Digest:

(a) If it be, 'to the general prejudice, for the advantage of any particular person.'

(b) If it be 'to the prejudice of any one, where there is not an equal prejudice or advantage to others in the same case'.

(c) If it be 'that any one shall be judge for himself': or, as it is more commonly put, 'that a man shall be judge in his own cause'.

(d) If it 'imports a loss on one side, without a benefit in consideration'.

"These are elementary considerations of fairness ; in applying them, and holding that a custom is unreasonable because it is one-sided, the court is saying in effect that it is not a custom at all, and there is a strong presumption against its ever having been a custom known and followed.

"4. It is well settled that *the time to decide the reasonableness of a custom is the time of its origin*. Now it is said that if a custom has not a rational basis, but has 'resulted from accident or indulgence, and not from any right conferred in ancient times upon the party setting up the custom', there is then strong evidence that the custom is unreasonable and unenforceable. It is not clear what is meant by 'indulgence' in this connexion, nor what is the relevance of 'conferring' (which presumably means granting) a right which arises by customs. As for 'accident', this cannot be considered a fatal objection to custom, for, as we have seen, it is impossible to find a specific and rational cause for every custom. These, therefore, do not seem to be valid grounds for rejecting a custom as unreasonable. The fact is that in the great majority of cases in which an ancient custom has been held to be unreasonable in its origin, it will be found that the real reason for rejecting it is that it was originally, or is now (or both), contrary to a well-established rule of law. When for example, in the famous *Tanistry Case*, (1608), Dav. 29, English Judges, accustomed to the rule of primogeniture, had to consider the validity of the Irish Brehon law of succession, they were faced with the apparently barbarous rule that the property descended not to the eldest-born but to the *senior et dignissimus* of the blood and surname of the last owner. There was no doubt of the existence of the custom, the origin and purport of which, as Maine has shown, the English Judges did not fully understand. One of the chief reasons which they assigned for rejecting the custom as 'encounter the Commonwealth' was that in practice it destined the property not to the *senior et dignissimus* but to the 'most potent'—a moral argument against the triumph of might over right. But no modern reader can fail to detect in the case a deep-seated prejudice against a custom which outraged feudal law by admitting a gap in the seisin, and by excluding daughters from the inheritance on the failure of heirs male; indeed, as Maine

observes, 'the judges thoroughly knew that they were making a revolution, and they probably thought that they were substituting a civilized institution for a set of mischievous usages proper only for barbarians.' Among the older precedents, the case just cited is the most authoritative, and is, indeed, the source of the chief learning in English law on the subject of custom. If we turn to a leading modern case on the same point, we find a similar view expressed in terms by an eminent Chancery Judge. In *Johnson v. Clark*, (1908) 1 Ch. 303, a married woman, in order to secure a debt due upon a promissory note, purported to convey, by way of mortgage, to the creditor of the promissory note, certain property in which she had a life interest under her father's will. The conveyance was made with her husband's concurrence, but without any separate examination of the wife. The wife sought to have the mortgage set aside on the ground that without separate examination, it was void in law. Against her it was contended that her estate was held in burgage tenure and that a local custom existed under which real property so held by a married woman could be disposed of by her with the consent of her husband without her separate examination and acknowledgment. Parker J. held that such a custom was repugnant to a principle of the Common Law vital at the time when the mortgage was made (though since abolished). Dealing with the question of reasonableness, he said: 'Looking at the matter apart from express authority, it is quite clear that for a custom to be good it must be reasonable or, at any rate not unreasonable.' The words 'reasonable or not unreasonable' imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. On the other hand, it is not the reason of the average human being to which appeal is made. Littleton says of customs: 'Whatsoever is not against reason may well be admitted and allowed', and on this Sir Edward Coke comments: 'This is not to be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law': Co. C. 62a. If this be so, it appears to follow that a custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent, or, at any rate not inconsistent, with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system".

According to Dias and Hughes, "The custom must be reasonable. This is the most complex and difficult of the requirements for the validity of a local custom. It is a condition which the courts have used in such a way as to gain a great measure of control over the admission of local customs. Theoretically, the courts should decide the question of reasonableness according to the standards of 1189, and this is indeed the test which they sometimes profess to adopt. More often, however, it would appear that they judge the issue of reasonableness by the con-

temporary standards of the date when the case comes to be heard. In *Bryant v. Foot*, a clergyman claimed a customary fee of thirteen shillings for every marriage which he celebrated. It was shown that the fee had customarily been collected for forty-eight years, but, although this might normally be sufficient to raise the presumption of antiquity, the court held that, since the sum of thirteen shillings would manifestly have been unreasonable in the days of Richard I as a fee for the celebration of a marriage, the custom could not be admitted. However, in *Lawrence v. Hitch*, decided in the same year, it was held that a customary claim to levy a toll of one shilling on every cart-load of vegetables (though this seems a somewhat excessive imposition on the subjects of Richard I) was not unreasonable. Now one shilling was the price of a quarter of wheat in 1189, but in a *Lawrence v. Hitch* the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench Division, argued that the toll might be construed as a power to levy a reasonable amount which might fluctuate with the value of money. This view was not adopted in *Bryant v. Foot*, and indeed it seems to amount to the substitution of a contemporary standard for the standards of 1189. The vital point is that, if the court adopts a contemporary standard for reasonableness, they are largely undermining the assertion that the custom is binding on them and that they must automatically enforce it, and are in effect subordinating it to judicial discretion. If reasonableness is judged by the standards of 1189, then it can be argued with some force that the test of reasonableness is only evidential to the existence of the custom from time immemorial, for if it were not reasonable in 1189, it probably did not exist then. Under this view the courts do not exercise any vital discretion over the admission of the custom in the question of reasonableness, but only use the test better to decide whether the custom was in existence in 1189. Dicta can be found to support both sides and no final answer is possible, for in some cases the courts have clearly employed the 1189 test, while in others they have adopted modern standards. A statement of principle in an ancient and renowned case is, however, very instructive as a revelation of the attitude of the mediaeval courts. In the *Tanistry Case*, in 1608, the Court said: 'And with regard to the various customs which have been adjudged void in our books, as being unreasonable, against common right or simply against law, if their nature and quality is considered, they will be found injurious to the multitude and prejudicial to the commonwealth, and to have their commencement for the most part through oppression and extortion of lords and great men. . . . All these customs. . . because they are prejudicial to the multitude of subjects, or to the commonwealth in general and commence by tort and usurpation, . . . are therefore adjudged unreasonable and void in law.'

"This seems ancient and clear authority for the discretion which the courts wield over the admission of local customs ; many



rules of common law might be supposed to originate in the oppression of lords and great men, but it took an Act of Parliament to abolish the doctrine of common employment. The courts clearly are not bound by a local custom in the same sense as they are by the common law." (Pp. 36-8, Jurisprudence).

(3) Only that custom is valid which has been *continuously observed* without any interruption from time immemorial. If a custom has not been followed continuously and uninterruptedly for a long time, the presumption is that it never existed at all.

(4) The enjoyment of a custom must be a peaceable one. If this is not so, consent is presumed to be wanting in it.

(5) A valid custom must be certain and definite. In one case, a customary easement was claimed to cast on the lands of neighbours the shadow of over-hanging trees. It was held to be vague and indefinite on the ground that the shadow of over-hanging trees was a changing occurrence.

(6) A custom is valid if its observance is compulsory. An optional observance is ineffective. It is the duty of the court to satisfy itself that the custom is observed by all concerned and not by any one who pleases to do so.

(7) The custom must be general or universal. According to Carter, "Custom is effectual only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless or rather does not exist."

(8) A valid custom must not be opposed to public policy or the principles of morality. It is not possible to define public policy accurately.

(9) A valid custom must not conflict with the statute law of the country. According to Coke, "No custom or prescription can take away the force of an Act of Parliament." A statute can abrogate a custom and not *vice versa*. However, it is to be observed that there are writers who hold different views on this point. According to them, legislation has no inherent superiority over custom. If the enacted law comes first, it can be repealed or modified by a later custom. If the customary law is the earlier, it can similarly be dealt with by later enacted law. According to Savigny, "If we consider customs and statutes with respect to their legal efficacy, we must put them on the same level. Customary law may complete, modify or repeal a statute; it may create a new rule and substitute it for the statutory rule which it has abolished". According to Windscheid, "The power of customary law is equal to that of statutory law. It may, therefore, not merely supplement but also derogate from the existing law. And this is true not merely of rules of customary law *inter se* but also of the relations of the customary to statute law."

According to Blackstone, "Customs must be consistent with each other, one custom cannot be set up in opposition to another. For if both are really customs then both are of equal antiquity, and both established by mutual consent, which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows : for these contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom".

### Custom and Prescription

When a thing is practised for a long time, it gives rise to a *rule of law* known as custom, but if it gives rise to a *right*, it is called prescription. A custom is a source of law but a prescription is a source of right. For example, in a certain community of a particular locality, a daughter has priority over collaterals of the third or remoter degree from time immemorial. It is a local custom and it gives rise to a rule of law. If X and his fore-fathers have from time immemorial been grazing cattle on a particular land belonging to Y, it gives rise to a right in X and it is called prescription. On account of their similarity, local custom and prescription were both bracketed under the heading of particular custom and prescription was regarded as a branch of custom. Prescription was considered as a particular custom confined to an individual. Both local custom and prescription require the same essentials to be valid. However, at present, local custom and prescription are clearly distinguished as there are prescriptive rights which do not show any similarity to local custom. The rule regarding time immemorial has been replaced in the case of prescription. Uninterrupted enjoyment for 20 years is considered to be enough to acquire a right to light and air.

Custom is based on long usage but prescription is based on lost grant and operates as a source of right. A custom must be reasonable and conform to justice, public policy and utility, but that is not necessary in the case of prescription. Custom is a generally observed course of conduct and has the force of law on account of long usage. Prescription means the acquisition of a right or title by user or possession in the manner laid down by law. Local custom relates to a particular locality or the members of a particular class. It is *lex loci*. Prescription is personal and applies to persons. While custom must be ancient, prescription requires only a period of 20 years.

### Suggested Readings

- Allen : Law in the Making.
- Hogbin : Law and Order in Polynesia.
- Plucknett : Concise History of the Common Law.

## CHAPTER XI

### EQUITY

#### Definition

Equity is also an important source of law. According to Sir Henry Maine, equity means “a body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of superior sanctity inherent in those principles.” According to Snell, equity may be defined as a portion of a natural justice which although of a nature suitable for judicial enforcement, was for historical reasons not enforced by the common law courts. Equity has been called the spirit of law. It refers to the general underlying principles of justice.

Salmond refers to three different senses in which the term equity is used. It is taken to be a synonym for natural justice. It aims at giving every man his due. It implies equity among men. In another sense, equity implies natural justice as opposed to the rigid principles of law. The rigidity of law is lessened with the help of equity. The principles of natural justice are applied to do substantial justice where the rigidity of law can result in injustice or where law does not provide any remedy at all. While administering equity, one has to go beyond or even contrary to law. After the passing of the Judicature Act of 1873, equity has acquired a meaning peculiar to the English system. It no longer extends or overrides or supplements law. It forms a part of law itself. It had its origin in the Court of Chancery and was originally flexible but it has now become as rigid as common law itself.

According to Allen, “Until recent times, when the technical elaboration of law has reached an advanced stage of development, a sharp line between the formal administration and the ethical ideal of justice had not been drawn. In the growth of legal systems a conscious aspiration towards a ‘constant’ of fairness in legal relationship has played a large part in shaping substantive rules. Equity has stood to strict law as a ‘supplementary or residuary jurisdiction’. This has been necessary because legal rules are formulated generalizations and as such are necessarily incomplete. Absolute uniformity cannot be achieved in the operation of any law, however well expressed in itself, and unless a margin is left for extraordinary case it will be found that *summum ius* is *summa injuria*, and the essential purpose of *ius* is thereby thwarted. This margin of discretionary interpretation may take the form of equity in general—a general disposition towards a humane and liberal interpretation of law; or particular equity a discretionary modification

of the strict law in individual exceptional cases which are not covered by the general rule. The former, as a general judicial attitude of mind, is comparatively easy to maintain and is essential to every rational system of justice ; the latter is more difficult, for though hard cases are in themselves a reflection, not to be ignored, upon the rule which causes them, it is not always possible or desirable to relax a necessary rule out of compassion for an unfortunate individual. In this sense, what is popularly called 'injustice' is inevitable in certain cases. Popular ideas of justice and injustice are not always to be trusted, being too much influenced by the particular and too little aware of the general. Nevertheless, the popular or natural sense of justice cannot be altogether disregarded; it has a real meaning in law, since it represents an average element in the community with which it is necessary that law should harmonize ; and most of the equitable or discretionary ingredients which are constantly found in legal systems are based upon this primary sense of justice inherent in the average moral sense of the community."

### Law and Equity

According to Salmond, before the passing of the Judicature Act of 1873, equity was a rival system to common law. In certain cases, it filled up the gaps in the common law. In certain other cases, it modified or overrode the common law. There was also a conflict between the equity courts and common law courts. By an injunction, an equity court could forbid the plaintiff from instituting proceedings or from enforcing the judgment in a common law court under the threat of imprisonment. If proceedings for an equitable remedy were started in a common law court, the plaint could be thrown out and plaintiff was asked to start fresh proceedings in the equity court. If separate remedies were available to the plaintiff in common law courts and equity courts, two separate proceedings had to be started. However, after the passing of the Judicature Act of 1873, equity became a concurrent system with common law.

According to Maitland, equity during the 17th century was not a system of law but an administrative system of discretion. There were conflicts between law and equity. However, when conflicts were resolved and equity became a system of law, it supplemented the common law and did not supersede the same. It was not a rival system at all. The view of Maitland is not accepted by Hohfeld. He is definitely of the opinion that equity overrode the law and did not merely fulfil the same. It was a rival system. The view of Dr. Hanbury was that by the 17th century, equity was not a rival system at all. Principles of equity were well-established by 1873 when the fusion was brought about. Separate equity courts and common law courts were abolished but the two systems still continued. According to Ashburner, "*The two streams of jurisdiction, though they run in the same channel, do not mingle their waters. The distinction between legal and equitable claims,*

*between legal and equitable defences and between legal and equitable remedies has not broken in any respect by recent legislation."*

According to Hanbury, "There can be little doubt that the reformers of 1873 underrate the tenacity of prevalent legal conceptions. They must have expected that the practical differences between common law and equity would before long disappear through fusion, and they would be astounded to be told that in 1949 a work called *Modern Equity* had entered its fifth edition. It is indisputable that fusion is far from complete."

### **Development of Equity in Rome**

The necessity of equity arose because law had to be brought into harmony with the growing needs of the people of Rome. The use of fiction was not enough to meet the needs of society as the social needs were developing more rapidly than fiction could cope with them. Legislation could be employed to meet the situation but in those days the legislatures were bothered about wars and other public affairs and did not bother about matters concerning purely private law. Under these circumstances, resort was taken to equity.

In Rome, judicial work was done by the Praetor and the Judex. The Praetor was an official who was elected for one year at a time. His duty was to administer justice in the city. As foreign trade began to develop, another Praetor was appointed to deal with cases between citizens and aliens. The Judex was not a lawyer. He was called in for a single case only.

Under the early Roman system, the principle followed was that where there is a legal remedy, there is a legal right. The principle that where there is a right, there should be a remedy was not recognised. As the needs of society began to grow, it became necessary to bring law into harmony with the needs of society. By means of his Edicts, the Praetor expanded and reformed the substantive law. By increasing and modifying orders, he expanded and modified legal rights. The Praetor did not administer Roman civil law but he gave justice according to the *Jus Gentium* or law which applied to the non-citizens of Rome. There was no rigidity about the formulae of the Praetor and he could change them according to the circumstances. A Praetor was selected for one year only and hence the Edicts used by him could also last for one year only. However, the same Edicts were handed down from one Praetor to another with the necessary changes according to the circumstances. The Edicts issued by the successive Praetors lessened the rigidity of the civil law of Rome. The Praetor incorporated in his Edicts some of the rules of the *Jus Gentium* which were applicable to the aliens and not citizens of the Roman Empire.

According to Dias and Hughes, "Equity played a most important part in Roman law. The extent to which this was inspired

by the Greeks is doubtful. The fact that the Roman jurists, like other educated Romans, had studied philosophy should not cause surprise. In at least one branch of the law, that relating to specification and accession to property, the philosophical basis of the law is clearly discernible. In the later Byzantine Empire the Greek influence is stronger, but by then the great formative period of Roman law was over. In any case, the extent of the influence was not great. The need to temper the rigour of the law is inherent in the very nature of law. The bulk of Roman equity was the product of the Roman legal genius, and it is reasonably certain that it would have evolved irrespective of Greek influence."

### Development of Equity in England

Before the growth of equity in England, justice was administered by the King's Bench, the Court of Common Pleas and the Court of Exchequer. The law administered by these courts was the common law. No injured person could get any justice if he could not bring his case under any of the remedies provided for the various wrongs. The remedies were provided by writs of various kinds. If there was no appropriate writ for a particular injury, there could be no remedy also. Experience showed that in many cases no appropriate remedy was available. In certain cases, the relief given by the common law courts was not always adequate. In the case of a breach of contract, the only relief granted was in the form of damages and there was no provision for specific performance. The procedure of the common law courts left much to be desired. It was cumbersome and full of formalities.

When such was the state of things, the injured parties began to send petitions to the King-in-Council but those petitions were disposed of by the Chancellor who was the conscience keeper of the king. After some time, people started sending applications direct to the Chancellor. The result was that a large number of cases came to the Chancellor and those were disposed of by him according to his conscience. With the passage of time, the Chancellor began to exercise three kinds of powers in this connection. As regards his *exclusive jurisdiction*, the Chancellor provided relief in those cases where the common law courts were doing havoc. Those cases referred to trusts and the administration of estates. As regards the *current jurisdiction* of the Chancellor, he dealt with those cases in which the remedy provided by common law was not adequate. Under the *auxiliary jurisdiction*, the Chancery aided a party to a common law action by making certain procedural orders for his benefit. Those orders related to the discovery of documents, examination of witnesses and interrogatories.

During the 17th and 18th centuries, equity made a lot of progress and supplemented the common law in many ways. English law was developed with the help of equity. However, the development stopped after the Chancellorship of Lord Eldon. Changes

were made in the beginning of the 19th century. The creative period of equity ended. The Act of 1873 abolished the common law courts and the Court of Chancery. The High Court of Justice was established in the country. It was divided into five divisions, namely, the Queen's Bench, Common Pleas, Chancery, Exchequer and the Probate, Divorce and Admiralty. The courts were directed to administer both law and equity.

According to Allen, "The distinction has certainly been modified by the Judicature Acts, but the policy of those statutes so often referred to as a 'fusion', in no sense meant the merger of one system in the other. There is still a frontier between the Common Law and the Chancery. The training is different, the habit of thought is different, the subjects of jurisdiction are different; and the English Bar is still divided into two kinds of practitioners who deal with quite distinct kinds of material and may be said without impiety to stand to each other in a state of friendly neutrality. Nobody supposes nowadays that equity is purely a matter of conscience and Common Law purely a matter of *ius strictum*. They are simply different branches of legal science; but the boundary between them is so clearly drawn that we in England are apt to think of the duality as juristically inevitable."

Equity has played in England the rôle of an addendum so far as the common law was concerned. The principles of equity remained uncertain to such an extent that they had the reputation of varying according to *the length of the foot of the Chancellor*.

According to Allen, "Our debt to equity is great and our acknowledgment should be unstinted. At the same time it is a matter of regret that in certain respects our system of equity, springing from such liberal principles, should have developed on lines which sometimes seem to be the opposite of natural justice. It is a fact only too observable that while the litigant in the King's Bench has some rudimentary notion of his rights and his prospects, litigant in the Chancery Division frequently cannot see a step ahead on his dolorous way. This is partly the heritage of our feudal land law with the most tortuous intricacies of which the Chancery has had to wrestle. A person of ordinary intelligence can understand a simple contract and will not be entirely baffled even by a complicated contract; but put in his hands a contract settlement of real property, and were he the greatest genius born, he could not understand two consecutive sentences of it without some initiation into the mysteries of the Chancery." Again, "While, therefore, equity (in the technical sense) has made important contributions to our law, there is another and a darker side of the picture. The history of the Court of Chancery is one of the least creditable in our legal records. Existing nominally for the promotion of liberal justice, it was for long corrupt, obstructive and reactionary prolonging for the most unworthy motives and obstinately resisting all efforts at reform. At no period was the Common Law open to the

same charges in the same degree. About a century ago, a cleansing process had to be undertaken for the sake of public health which was suffering severely. Charles Dickens did not exaggerate the desolation which the cold hand of the old Court of Chancery could spread among those who came to it 'for the love of God and in the way of charity.' All that is gone and we breathe again a healthy atmosphere ; but even today it is not in a spirit of cynicism, but of cold truth, that a modern Chancery Judge (Buckley J.) is able to say : 'This Court is not a Court of conscience'." And again, "It is doubtful whether the general spirit and utility of equity in English law have gained by being detached in a separate jurisdiction. English equity has developed a rigour and artificiality of its own which has sometimes resulted in the denial rather than the furtherance of natural justice. The desire to respect conscience has sometimes led to such an austerity that the dictates of conscience have become impracticable. Moreover, equity has shown some over-anxiety to follow and maintain artificial rules when they have reached extremes of questionable utility. The nineteenth century has, however, done much to reform these defects."

### **Roman and English Equity**

Both in Rome and England, changes in law were made by the growth of equity. In the case of Rome, it was done by means of the formulae of Praetor. The equity courts in England exercised exclusive, concurrent and auxiliary jurisdictions. Both of them put emphasis on the ethical superiority of their principles and not on law. In the case of Rome, equity became rigid like the rules of law in the reign of Alexander Severus. England reached that stage in the time of Lord Eldon. The work of the Praetors was given the form of law by Justinian. A similar work was done in England by the Judicature Act of 1873. The Praetor by his Edict was believed to restore a type from which the law had departed and deteriorated. In England, the king claimed to exercise his right to supervise the administration of justice.

As regard differences between the two systems, English equity was administered by a different tribunal known as the Equity Court or Court of Chancery. It was presided over by the Chancellor. In the case of Rome, the Praetor administered both equity and civil law. While there was a conflict between equity courts and common law courts in England, the same was not the case in Rome. The Roman system was in the form of statute law but the English system was in the form of judicial decisions. The Roman Praetor introduced more changes into the law than the English Chancellor. Roman equity was concerned with testamentary and inter-state succession but the law of trusts was developed in England. The equitable remedies of specific performance and injunction were also provided in England.



**Suggested Readings**

<b>Allen</b>	: Law in the Making.
<b>Buckland</b>	: Equity in Roman Law.
<b>Friedmann</b>	: Law and Social Change.
<b>Hanbury</b>	: Modern Equity.
<b>Maine</b>	: Ancient Law.
<b>Olivercrona</b>	: Law as Fact.
<b>Paton</b>	: Jurisprudence.
<b>Plucknett</b>	: Concise History of the Common Law.
<b>Vinogradoff (Ed.)</b>	: Essays in Legal History.

## CHAPTER XII

### PROFESSIONAL OPINIONS AND RELIGION

#### Professional Opinions

Professional opinions are also a source of law. These can be discussed under the heads of the *Obiter dicta* of judges, general opinions of the legal profession and opinions of writers upon legal subjects. According to Savigny, "There is formed a special order of persons skilled in law who, an actual part of the people, in the order of thought represent the whole. The law is, in the particular consciousness of the order, merely a continuation and special unfolding of the folk-law. It leads henceforth a double life; in outline it continues to live in the common consciousness of the people, the minute development and handling of it is the special calling of the order of jurists."

(1) The *obiter dicta* are the statements of law made by a judge in the course of a decision, arising naturally out of the circumstances of the case, but not necessary for the decision. The value of these dicta as a source of law depends upon the reputation of the judge and the relation of the rest of the law upon the specific point in question and upon similar topics.

(2) The *legal profession* consists of the judges, the practising lawyers and teachers of law. These branches of the legal profession exercise a powerful influence upon the development of law. Although the influence of professional opinion is not so great in England as was the case in Rome, yet their influence is considerable. English judges are chosen from the ranks of the Bar and teachers of law and their decisions reflect rather the opinions of their order than of themselves. Many existing rules of law owe their origin to the support of the legal profession. In the case of India, the judges are recruited from the services and the Bar and their views have done a lot for the growth of law.

According to Sir Amir Ali, "The four principal schools of law among the Sunnis named after their founders, originated with certain great jurists, to whom has been assigned the distinguished position of Mujahid Imams, namely, Expounders of Law par excellence. By virtue of their learning and their eminence, they were entitled not to be bound to the interpretation of the law by any precedent, but to interpret it according to their own judgment and analogy."

(3) The *opinions of the writers of text-books* also help the growth of law. It has been particularly so in the case of international law. Its rules have frequently depended upon the opinions of jurists.

International law in its present form would not have been possible without the work of writers like Grotius. The influence of writers of text-books was greater in Roman law than in English law. That is partly due to the fact that the study of law occupied a very important position in the lives of the educated Romans. No wonder, many of the greatest minds of the age were attracted to the study of law and consequently the prestige of jurisprudence was very high. The writers of text-books on law moulded and educated public opinion and pointed out the changes and developments which seemed desirable to them. Each text-book on law enjoyed an almost binding authority. However, its importance depended upon the reputation of the author. The writings of jurists like Gaius, Ulpian, Paul, Papinian and Modestinus enjoyed almost statutory authority. According to the Law of Citations of 426 A. D., the opinions of the above five jurists were to be considered as binding in any law suit. If the authorities differed, the opinion of the majority was to be followed. Where the numbers on each side were equal, that side was to prevail which had the support of Papinian. If Papinian was silent on any point and the other authorities were equally divided, the judge was free to make his own choice. According to Gray, "By the time of Diocletian, the *Jus Respondendi* seems to have ceased to be given, and gradually, all the writings of the great jurists of the earlier years of the Empire came to be considered as authorities, without any distinction being made between their response and their treatises. It was as if Judge Story's judgments and treatises were considered of like weight."

In medieval and modern Europe, the writings of great jurists proved a very important source of law. They actually decided what system of law should prevail in a particular country. In Italy, the labours of the Glossators and the commentators created the Pandect law which ultimately triumphed in that country. The German civilians brought the Pandect law to Germany.

A large number of English jurists expounded and influenced law in their own way. Bracton was the earliest English jurist whose name can be mentioned in this connection. The same was the case with the writings of Littleton, Fitzherbert, Coke, Blackstone, Dicey, Anson and Chitty. The same was the case with Justice Story in the U. S. A. Blackstone combined the functions of a judge, a text-book writer and a university professor. According to Dr. Jenks, "It is sometimes said that, even so late as the period now under discussion, the text-books of certain very eminent writers have been treated as authorities by English Courts, and should therefore be regarded as sources of modern English law. But this is true only in a modified sense. Doubtless such works as Blackstone's Commentaries, Dalton's County Justice, and Hawkins' Pleas of the Crown, may be fairly treated by the historian as statements, *prime facie* correct, of the law at the time when they were written. It may even be that, having regard to the great reputation of such writers, English judges will allow

advocates to quote from them, and will even themselves, in delivering judgments, allude with respect and approval to these works. But it cannot be seriously contended that these works are authorities in the sense in which Bracton, Littleton, and even Coke, are authorities for the law of their respective periods. The difference between the weightiest passage of a modern text-book writer and the most ordinary judgment of a Court of First Instance, or an unimportant section of an Act of Parliament, is quite clear. The advocate may show that the passage in question is inconsistent with statute or judicial decision ; and, if he succeeds, its so-called 'authority' is at once gone. He may attempt to show the un-wisdom, absurdity, or inconsistency of the judicial decision or the section of the Act of Parliament ; but, until these have been overruled by a later statute, or (in the case of the judicial decision) by a superior tribunal, they remain binding *pari materia*, and, even if the advocate is not pulled up for irrelevance, his argument will be of no avail. Even Blackstone, one of the greatest text-book writers, admits freely the truth of this view. Text-book writers, whatever they once were, are now guides only, and not authorities for English law."

According to Keeton, "The conservatism of English law in refusing to admit the authority of a text-book writer until his works have adequately satisfied the test of time is justified when we remember that the writer is essentially a theorist, rather than a practising lawyer, at the time of writing, and in consequence he is subject to certain influences arising out of that situation. In the first place, he is apt to state his rules too broadly. He is always eager to discover general principles and tendencies underlying his science; the modern literature of Roman law, especially, contains works written purely from the standpoint of some particular theory, and the evidence has been "interpreted" twisted, and even forgotten altogether, in order to preserve that theory. Again, a text-book writer has not the same responsibility as a judge, whose decisions, in the form of reasoned judgments, are composed with an actual case before him, reminding him of the fact that the rights of definite individuals will be affected by his decisions, and further, that his decisions form a link in a chain of precedents vitally affecting human existence in that particular community, in general. This gives judicial decisions a more cautious character than the writings of jurists. Indeed, largely on account of their remoteness from the general trend of human affairs, there have been jurists advocating the direct penalties and the most severe constructions of the laws of some systems, when they themselves were among the most peaceful and benevolent of mankind in their personal relations. The doctrines of ruthlessness, based on state necessity, put forward by some writers upon international law during the nineteenth century and the opening years of the twentieth gave some colour of legal justification to the perpetration of some of the most reprehensible acts of recent warfare."

According to Paton, the text-book attempts to universalize, to reduce to an ordered unity and to discover the deeper principles that underlie particular decisions. However, he has a much narrower creative function than a judge as he holds no official position. According to Pomponius, legal reforms cannot be brought about without the help of experts in common law. Law is like a complicated machine and it can be improved only by those who are cognizant of its mechanism.

According to Holdsworth, "No doubt the practice of conveyancers is not law in the same sense as a statute or judgment is law, and if it is founded on an erroneous view of the law it will be disregarded. But provided that it is unanimous and provided that it is not contrary to any ascertained rule of law, it will be such cogent evidence of the law that it will rarely be disregarded by the courts."

"For the exposition of our very complicated real property law," says Byrne, J., "it is proper in the absence of judicial authority to resort to text-books which have been recognized by the courts as representing the views and practice of conveyancers of repute", and he proceeds to make reference, among other works, to Challis on Real Property—a book which has been constantly cited with approval in the Chancery Division. Nor is this principle confined to any particular jurisdiction. In a very different branch of the law—Admiralty—we find Lord Atkin paying the following compliment to extra-judicial doctrine: "This is one of those cases dealing with damages which in my experience I have found to be a branch of law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider. I think the law as to damages still awaits a scientific statement which will probably be made when there is a completely satisfactory text-book on the subject."

In *Bastin v. Davies*, (1950) 2 K. B., 579, Lord Goddard, C. J., said that "*this court would never hesitate to disagree with a statement in a text-book, however authoritative or however long it had existed, if it thought right to do so*," but he added: "It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known text-book for a great number of years without being judicially doubted and after it had been acted on by justices and their clerks for many years."

Lord Denning wrote the following about the third edition of Winfield's Text-book of the Law of Tort, "The reason why such books are so useful in the courts is that they are not digests of cases but repositories of principles. They are written by men who have studied the law as a science with more detachment than is possible to men engaged in busy practice. The influence of the academic lawyers is greater now than it has ever been, and is greater than they themselves realize. Their influence is largely

through their writings. The notion that their works are not of authority except after the author's death has long been exploded. Indeed, the more recent the work, the more persuasive it is, especially when it is a work of such an authority as Professor Winfield; because it considers and takes into account modern developments in case law and current literature. Winfield is now cited in place of Pullock; and Cheshire and Fifoot in place of Anson. The essays of Professor Goodhart have had a decisive influence in many important decisions. The vast tomes written and edited by practitioners for practitioners fulfil a different purpose. They are valuable as works of reference. They are cited not for principles but for detailed rules on special subjects. They are most important in day-to-day practice, but do not compare with books such as Winfield when it comes to fundamental principles."

### Religion

Religion is also a source of law. According to Sir Henry Maine and Sir James Frazer, the religious fear of evil was the principal instrument in securing uniformity of conduct in primitive society at a time when law did not enjoy an independent existence. The Jews regarded their laws as divine in origin and the same is a case with the Hindus and Mohammadans. In the case of Roman law, *Jus* was at first inextricably mixed up with *Fas* and for a time, the pontiffs administered both. The law of western Europe would have been different in form and content if there had been no Christianity. It was Christianity which preserved the substance of Roman law.

According to Sir Henry Maine, the origin of law in Greece was the Themistes or the divinely inspired judgments of the priest judges. Religion also enriched the law of England. The Chancellors of England who were responsible for the growth of equity, were guided by their conscience. In the case of *Cowan v. Milbourne*, it was held that "Christianity is part of the law of England." This view was set aside in 1917 in the case entitled *Bowman v. Secular Society*, but in spite of this, to ridicule the tenets of Christianity is blasphemy under the English law.

### Agreement

According to Sir John Salmond, an agreement is also a source of law as it gives rise to conventional law. To quote him, "That an agreement operates as a source of rights is a fact too familiar to require illustration." If X and Y enter into an agreement which is a lawful one, the courts of law recognise that agreement and enforce the same on X and Y. The same is the case if A and B enter into an agreement with a lawful purpose. However, such agreements bind only the parties to the agreement and not others. Law is a rule of conduct and generality is the test of law. There is no generality in an agreement between two parties. An agree-

ment is recognised so long as it exists, and when it is dissolved, it has no further effect. Agreements play an important part in international law. There may be an agreement among a large number of states to follow a particular procedure with regard to a certain matter. The states entering into the agreement are bound by that. If the agreement is continued for a long time by a large number of states, it acquires the force of a custom and custom thus born is a source of international law. According to Keeton, "Custom is a source of international law, but agreement never is so; agreement is merely a source of custom and only then if a number of other agreements exist compelling uniformity of conduct in the states who are parties to them. The process of municipal law is exactly the same. A number of agreements concluded in the same way and enforcing similar courses of conduct on the parties to them may cause a custom to grow. But it is the custom and not the agreement which is always the source of law."

### Suggested Readings

Amos and Walton	Introduction to French Law.
Dias and Hughes	Jurisprudence.
Levi, E. H.	Introduction to Legal Reasoning.
Levy—Ullmann	The English Legal Tradition.
Paton	Jurisprudence.
Pound, R.	The Formative Era of American Law.
Salmond	Jurisprudence.
Stone	The Province and Function of Law.

## CHAPTER XIII

### RIGHTS AND DUTIES

The terms 'wrong' and 'duty' are closely connected with rights and it is desirable to refer to them before discussing the important subject of legal rights.

#### Wrong

According to Salmond, "A wrong is simply a wrong act—an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of *injuria* (that which is contrary to *jus*), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage whether rightful or wrongful and whether inflicted by human agency or not."

According to Pollock, "Wrong is in morals the contrary of right. Right action is that which moral rules prescribe or commend, wrong action is that which they forbid. For legal purposes anything is wrong which is forbidden by law; there is wrong done whenever a legal duty is broken. *A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability.* Hence the existence of duty, as it involves right, involves also the possibility of wrong; logically no more than the possibility, though we know too well that all rules are in fact sometimes broken. Duty, right and wrong are not separate or divisible heads of legal rules or of their subject-matter, but different legal aspects of the same rules and events. There may be duties and rights without any wrong; this happens whenever legal duties are justly and truly fulfilled. There cannot, of course, be a wrong without a duty already existing, but wrongs also create new duties and liabilities. Strictly speaking, therefore, there can be no such thing as a distinct law of wrongs. By the law of wrongs we can mean only the law of duties, or some class of duties, considered as exposed to infraction, and the special rules for awarding redress or punishment which come into play when infraction has taken place. There is not one law of rights or duties and another law of wrongs. Nevertheless there are some kinds of duties which are more conspicuous in the breach than in the observance. The natural end of a positive duty is performance. A thing has to be done, and when it is duly done the duty is, as we say, discharged; the man who was lawfully bound is lawfully free. We contemplate performance, not breach. Appointments to offices are made, or ought to be, in the expectation that the persons appointed will adequately fulfil their official duties." (Jurisprudence and Legal Essays, Pp. 37-38).



Wrongs are of two kinds, *legal* and *moral*. The essence of a legal wrong is that it is a violation of justice according to the law—not the manner in which the guilty are treated. It is a legal wrong if a debt is not paid within the period of limitation. A moral wrong is an act which is morally or naturally wrong. It is contrary to the rule of natural justice. It is a moral wrong to disobey one's parents. A legal wrong need not be a moral wrong and *vice versa*.

### Duty

According to Salmond, "A duty is an obligatory act, that is to say, it is an act opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty and the performance of a duty is the avoidance of wrong."

Duties are of two kinds, *legal* and *moral*. A legal duty is an act the opposite of which is a legal wrong. It is an act recognized as a duty by law and treated as such for the administration of justice. A moral or natural duty is an act the opposite of which is a moral or natural wrong. A duty may be moral but not legal, or legal but not moral, or both at once. In the case of England, there is a legal duty not to sell or have for sale adulterated milk knowingly. There is no legal duty in England to refrain from offensive curiosity about one's neighbours even if its satisfaction does them harm. There is a moral duty but not a legal duty. There is both a legal and moral duty not to steal.

According to Salmond, if a law recognizes an act as a duty, it generally enforces its performance and punishes those who disregard the same. According to Keeton, a duty is an act or forbearance compelled by the state in respect of a right vested in another and the breach of which is a wrong. According to Hibbert, duties are imposed on persons and require acts and forbearances which are their object. Hibbert refers to absolute and relative duties. Absolute duties are owed only to the state. The breach of an absolute duty is generally a crime and the remedy is the punishment of the offender and not the payment of any compensation to the injured party. Relative duties are owed to a person other than the one imposing them. The breach of a relative duty is called a civil injury and its remedy is compensation or restitution to the injured party.

According to Austin, some duties are absolute. Those duties do not have a corresponding right. Examples of absolute duties are self-regarding duties such as a duty not to commit suicide or become intoxicated, a duty to indeterminate persons or the public such as a duty not to commit a nuisance, a duty to one not a human being such as a duty towards God or animals and a duty to sovereign or state,

If we examine these four classes of duties critically, they are reduced to one category and that is the duties to the state. A duty not to commit suicide or nuisance is enforced by the state and can be included in the category of duties to the state. The result is that the corresponding right vests in the state. However, the view of Austin is that "a sovereign government in its collegiate or sovereign capacity has no legal rights against its own subjects" and therefore the duties towards the state are absolute duties. Dr. Allen, Markby and Hibbert support Austin. According to Hibbert, "The distinction between absolute and relative duties is logical and convenient since it harmonises with the distinction between might and right."

The view of Austin is criticised by Gray, Pollock and Salmond. According to Salmond, "there can be no duty without a right any more than there can be a husband without a wife or a parent without a child." The result is that rights and duties are always correlated and there is absolutely no scope for absolute duties. The view of Pollock is that "there seems to be no valid reason against ascribing rights to the state in all cases where its officers are enjoined or authorised to take steps for causing the law to be observed and breakers of the law to be punished."

It is pointed out that the view of Salmond is to be preferred to that of Austin because his definition of law is more in accord with modern juristic ideas than that of Austin.

### **Definition of Legal Rights**

Many definitions of rights have been given by various writers and reference may be made to some of them. According to Hibbert, a right is "one person's capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God, the right is Divine. If such third party is the public generally acting through opinion, the right is moral. If such third party is the state acting directly or indirectly, the right is legal."

According to Gray, a legal right is "that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons." According to Salmond, "A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong." A legal right must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by law inasmuch as cruelty to animals is a criminal offence. But beasts are not for that reason possessed of legal rights. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare

of the animals belonging to it. He who ill-treats a child violates a duty which he owes to the child and a right which is invested in him. But he who ill-treats a dog breaks no *vinculum juris* between him and it, though he disregards the obligations of humane conduct which he owes to the society or the state and the co-relative right which society or state possesses.

According to Vinogradoff, "We can hardly define a right better than by saying that it is the range of action assigned to a particular will within the social order established by law.... A right, therefore, supposes a potential exercise of power in regard to things or persons. It enables the subject endowed with it to bring, with the approval of organized society, certain things or persons within the sphere of action of his will. When a man claims something as his right, he claims it as his own or as due to him."

According to Holland, a right is "a capacity residing in one man of controlling, with the assent and the assistance of the state, the actions of others." Again, "That which gives validity to a legal right is, in every case, the force which is lent to it by the state. Anything else may be the occasion but is not the cause of its obligatory character. Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus on the one hand, the ownership of the land is power residing in the landowner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject and exercised over his child as its object, available against all the world besides. On the other hand, a servant has a power residing in himself as its subject, over no tangible object, and available only against his master to compel the payment of such wages as may be due to him.

Holland explains the conception of legal rights by contrasting them with might and moral rights in these words: "If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes.

"If, irrespective of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his doing, then he has a 'moral right' so to carry out his wishes.

"If, irrespective of his having or not having, either the might or moral right on his side, the power of the state will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

"If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of the public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the state to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the state. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as we stated previously, for the definition and protection of rights."

According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force". Legal right is the power of removing or enforcing legal limitations on conduct.

According to Martin, "It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dockyard and had liberty to use the water closet. But that is a fallacious argument. It is true that the plaintiff had permission to use the path. Permission involves leave and licence, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a licence, not of a right. It is an abuse of language to call it a right".

According to Pollock, "Right is freedom allowed and power conferred by law." According to Kirchmann, a right is "a physical power which through the commands of authority not only is morally strengthened but also can protect against a transgressor by the application of compulsion or evil." According to Buckland, a legal right is an interest or an expectation guaranteed by law. According to T. H. Green, "Rights are powers which it is for general well-being that the individual should possess". According to Kant, a right is "the authority to compel". According to K. R. R. Shastri, "A right may be defined as an interest recognized and protected or guaranteed by the state since it is conducive to social well-being".

According to Austin, law is a general command of the sovereign and duty is the liability to incur the evil of its sanction in case of non-compliance with the command. A person in whose favour or to whose benefits the command enures is said to be invested with a right. A person has a right if he can exact from another or others acts or forbearances. "A party has a right when another or others are bound or obliged by the law to do or forbear towards or in respect of him". This definition does not make any reference to the element of interest involved in the conception of right. Mill

pointed out that a prisoner may be said to have a right to be imprisoned because the jailor is bound by law to imprison him. To be imprisoned is no right. It is only a disability imposed by the sanction of law.

According to Austin, liberty is illusory if it is not protected by law and if law protects it, it amounts to a right. The difference between a right and liberty lies only in the emphasis laid on particular elements in the conception. In liberty, prominence is given to the absence of legal restraint and protection is secondary, but in the case of right it is just the other way. Right denotes protection and the absence of restraint. However, the same elements are comprised in both. For this reason, Austin came to the conclusion that rights and liberties were essentially the same. However, critics point out that Austin ignored the element of interest involved in liberty. What the law protects in liberty is not the interest involved in it but only the exercise of liberty. Rights and liberties are essentially different. Rights pertain to the sphere of obligations and liberties pertain to the sphere of free will. Rights refer to those things which others ought to do for me and liberties refer to those things which I may do for myself.

### Theories about Legal Rights

There are many theories with regard to the nature of legal rights. (1) Austin, Holland, Pollock, Vinogradoff and others are the exponents of the *will theory*. According to this theory, a right is an inherent attribute of the human will. The subject-matter of a right is derived from the exercise of a human will. The will theory was inspired and extended by the doctrine of natural rights. It is the function of law to confer certain powers or allow certain freedom to individuals in the form of legal rights. A legal right is a power conferred by law. According to Justice Holmes, a legal right is "nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force." Again, "Legal right is the power of removing or enforcing legal limitations on conduct." According to Puchta, a legal right is a power over an object which by means of this right can be subjected to the will of the person enjoying the right. According to Holland, a legal right is "the capacity residing in one man of controlling with the assent and assistance of the state, the actions of others."

(2) Another theory is known as the *interest theory of rights*. Ihering is the greatest advocate of this theory and many English and American writers have followed him. According to Ihering, "A legal right is a legally protected interest." Ihering does not put stress on the element of will in a legal right. On the other hand, he puts emphasis on the material element of interest. The basis of right is not will but interest. According to Buckland,

a legal right is "an interest or an expectation granted by law." According to Salmond, a legal right is "an interest recognised and directed by a rule of right." Paton defines a legal right in terms of recognition and protection by the legal order. According to him, although enforceability by legal process is said to be a necessary condition of a legal right, yet there are three qualifications to the above statement. Law does not always enforce a right and the injured party is guaranteed merely damages. There are certain imperfect rights which are recognised by law only partially. A time-barred debt cannot be realised through the agency of courts as it is an imperfect right, but if the creditor comes to have the money in some way, he can adjust the same towards the debt and need not return the same. Likewise, a time-barred debt may be revived if the debtor acknowledges the same. In certain cases, the courts of justice do not have an adequate machinery to enforce their decisions. This is particularly so in the case of international law.

Allen tries to bring about a reconciliation between the will theory and interest theory. According to him, the essence of a legal right seems to be not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realise an interest. A similar attempt at reconciliation is made by Jellinek also. According to him, a right is the will power of man applied to a utility or interest recognised and protected by a legal system. The human will does not operate in a vacuum and interests are the objects of human desire. An interest is a formal expression of the will of an individual or a group of individuals. A correct theory of legal rights must take into consideration both the elements of will and interest.

### **Duguit's Theory of Right**

According to Duguit, will is not an essential element in law or right. The real basis of law is social solidarity. The emphasis on will is anti-social as it shows that man is in conflict with his fellow-beings. Duguit rejects altogether the conception of legal rights. There is no conflict of interests between society and the individuals. The theory of subjective rights is merely "a metaphysical abstraction." To quote him, "The right of the individual is a pure hypothesis, a metaphysical affirmation, it is not a reality. It implies a social contract at the origin of society, a manifest contradiction. No one has any other right than always to do his duty." Duguit goes to the extent of saying that the term right should be removed from legal vocabulary.

The theory of Duguit has been criticized from many quarters. According to Dr. Jenks, "If one individual can in the name of the law and by the agency of the state's officials bring down upon another who has committed a breach of a legal duty, the sanction attached to that duty, there exists in the first individual a power

to enforce, with the aid of the state, a legal duty and to that power the jurist gives the name of legal right." According to Laski, the denial of legal rights by Duguit is "terminological rather than actual."

(4) According to the totalitarians, the whole conception of legal rights is wrong. The only real thing is the state and not much importance should be attached to the individuals. The state is omnipotent and all-embracing and individual has no existence independent of the state. All rights belong to the state and the individual as such can claim nothing.

### **Essentials of a Legal Right**

According to Salmond, every legal right has five essential elements. There must be a person in whom the legal right is vested and who can be distinguished as the owner of the right, the subject of it or the person entitled. There must be a person against whom the right avails and upon whom the correlative duty lies. He may be distinguished as the person bound or as the subject of the duty. He is the person who has to act or forbear. There is an act or omission which is obligatory on person bound in favour of the person entitled. This can be called the content of the right. There must be something to which the act or omission relates and which may be termed the object or subject-matter of the right. There must be a title by reason of which the right has become vested in its owner.

Salmond illustrates his point by an example. According to him, if A buys a piece of land from B, A is the subject or owner of the right so acquired. The persons bound by the correlative duty are the persons in general. The content of the right consists in non-interference with the purchaser's exclusive use of the land. The object or subject-matter of the right is the land. The title of the right is the conveyance by which it was acquired from its former owner.

According to Salmond, a legal right is a right against some person or persons. It is a right to some act or omission of such person or persons. It is a right over or to something to which that act or omission relates.

Holland refers to four elements of a right. The first element is a person in whom the right resides or who is clothed with the right or who is benefited by its existence. The second element is an object over which the right is exercised. The third element is the act of forbearance which the person in whom the right resides is entitled to exact. The fourth element is the person from whom the above acts on forbearances can be exacted. There must be a person against whom the right is available. Thus, the four elements are the person entitled, the object, the act or forbearance and the person obliged.

Holland gives two examples to illustrate his point. A testator leaves to his daughter a silver tea-service. Here the daughter is the person of inherence, *i.e.*, in whom the right resides; the tea-service is the object of the right; the delivery to her of the tea-service is the act which her right entitles her and the executor is the 'person of incidence', *i.e.*, the person against whom her right is available. Take the example of a right where the second term of the series is wanting. B is the servant of A. A is the person of inherence. Reasonable service is the act to which A is entitled. B is the person of incidence against whom the right is available. According to Holland, "The nature of the right varies with a variation in any one of the four terms which may be implied in it; and the variations in the nature of the right give rise to the main heads or departments of law."

### **Parties to a Legal Right**

According to Austin, there are three parties to a legal right. The first party is the state or the sovereign which confers legal rights on certain individuals and which imposes corresponding duties on others. The second party is the person or persons on whom the right is conferred. The third party is the person or persons on whom the duty is imposed or to whom the law is set or directed.

### **Enforcements of Legal Rights**

There are many methods of enforcing legal rights. If a party has suffered, the usual method is to award damages in civil cases. If it is found that damages are not an adequate remedy, an order can be made for the restitution of the thing itself. This is particularly so in the case of rare articles. In certain cases the court orders the specific performance of the contract itself. Sometimes, penalty is imposed in certain cases. The injured party is given the power to recover an amount which is more than the loss suffered. Sometimes, a legal right can be enforced by means of an injunction. When an injunction is issued, it is the duty of the person concerned to abstain from doing an act or contravening an act.

### **Extinction of Rights**

There are many methods by which legal rights can be extinguished. Right is extinguished if the other party performs its duty. If there is a conflict for the payment of debt and the same is paid by the debtor, the legal right is extinguished. Certain rights may be waived by the agreement of the parties. Sometimes, a legal right becomes extinguished when it becomes impossible to perform the same. A person contracts to render personal service to another. The legal right to personal service is extinguished if the promisor dies. A right may be extinguished by the operation of law. A right in land may be extinguished if a



law is passed by which Zamindaries are abolished. Likewise, a right is extinguished if the debt becomes time-barred. Law helps the vigilant and not the dormant. If a person does not bother about his rights, no court of law is going to help him. A right acquired by fraud or undue influence may be extinguished if the other party takes action at the right time.

### **Rights and Duties**

There is a difference of views with regard to the relation between rights and duties. According to Holland, every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. A moral duty is that which is demanded by the public opinion of society and a legal duty is that which is enforced by the power of the state. According to Keeton, a duty is an act or forbearance which is enforced by the state in respect of a right vested in another and the breach of which is a wrong. Every right implies a correlative duty and *vice versa*.

According to Austin, duties are of two kinds, absolute duties and relative duties. A relative duty corresponds to a right. It is a duty to be fulfilled towards a determinate person. All absolute duties are enforced criminally. They do not correspond with rights in the sovereign. There is an absolute duty in certain cases. It is so when it is commanded that the act shall be done or forbore towards or in respect of the party to whom the command is directed. There is an absolute duty when it is commanded that the act shall be done or forbore towards or in respect of parties other than the obliged but who are not determinate persons, physical or fictitious. There is an absolute duty when the duty imposed is not a duty towards man or where the acts or forbearances commanded by the person are not to be done or observed towards a person or persons. The same is the case if the duty is merely to be observed towards the sovereign making it. There is no relative duty of an individual towards himself. A person owes a duty not to commit suicide and it is the duty of the state to see that he does not do so.

According to Austin, as the sovereign is the law-giver, it cannot possess rights. The reason is that a right is an interest protected by law and as the sovereign is the creator of law, it cannot be made responsible to it. However, Salmond does not accept this view of Austin. According to him, although the law is dependent on the whim of the sovereign, yet the latter can have rights under the law. It is not impossible for a man to confer rights upon himself. Allen accepts the point of view of Austin and comes to the conclusion that there are no correlative rights in the state. The duties enforced by criminal law are absolute duties. There is no corresponding right to the duty of sending children to the school or getting them vaccinated,

According to Prof. Hibbert, "The distinction between absolute and relative duties is logical and convenient, since it harmonises the distinction between might and right ; for the state can only redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringement by their own might but by appealing to the sovereign for protection of their rights which is quite a different method of redress "

Holland considers the view of Austin regarding absolute duties as unsatisfactory. To quote him, "Not only are we quite willing to concede that a man can have no relative duty towards himself, towards God or towards the animals. We go further and maintain that he can have no legal duty towards these things, whatever may be his moral or religious obligations towards them. But we deny that there can be no relative duties to persons indefinitely or what seems to amount to the same thing, to the sovereign. In other words, we assert that the sovereign may be clothed with a right. Indeed it is not improper to talk of the state as having duties, namely, such as it prescribes to itself, though it has the physical power to disregard and the constitutional power to repudiate them."

According to Paton, "We cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we really refer to a right-duty relationship between two persons, and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed." Kecton also does not accept the point of view of Austin. Rights and duties are always co-relative. There cannot be such a thing as an absolute duty. According to Salmond also, rights and duties are co-relative. If there are duties towards the public, there are rights as well. There can be no duty unless there is some person to whom that duty is due. Every right or duty involves a bond of legal obligation.

### **Ownerless Rights**

There is no unanimity of opinion as to whether every right must have an object or not. According to Salmond, an ownerless right is an impossibility. There cannot be a right "without a subject in whom it inheres any more than there can be weight without a heavy body ; for rights are merely attributes of persons and can have no independent existence." The object of law is to protect a person in the exercise and enjoyment of a particular right and not to protect a right in itself. A right cannot exist in vacuum. A right may be held of a determinate individual or by the public at large. Although every right has an owner, it need not have a vested and certain owner. The fee simple of a land may be left by will to a person who is unborn at the time of the death of the testator. The ownership of the land is contingent on the birth of

the child. Sometimes, the question arises as to who is the owner of a debt in the interval between the death of the creditor intestate and the vesting of his estate in an administrator. According to Roman law, the rights contingently belong to the heir but they were for the time being vested in the inheritance by virtue of its fictitious personality. The fictitious personality was that of the deceased and not of the future heir. Before the passing of the Judicature Act of 1873, the personal property of an intestate in the interval between death and the grant of letters of administration, was deemed to be vested in the judge of the Court of Probate. Now, it vests either in the President of the Probate, Divorce and Admiralty Division or in the judges of the High Court collectively.

At present, neither the Roman nor the English fiction is necessary. There is no difficulty in saying that the estate of an intestate is presently owned by a *incerta persona* or by the person who is subsequently appointed its administrator.

There are some writers who are of the opinion that there are some rights without objects. According to them, the object of a right means some material thing to which it relates. In this sense, an object is not an essential element in the conception of right. There are others who admit that a person or a material thing may be the object of a right as in the case of a husband having a right in respect of his wife or a father having a right in respect of his children. They deny that the right of reputation or personal liberty or the right of a patent or copyright has any object at all.

On the point of ownerless rights, Salmond concludes thus : "An object is an essential element in the idea of a right. A right without an object in respect of which it exists is as impossible as a right without a subject to whom it belongs. A right is.....a legally protected interest ; and the object of the right is the thing in which the owner has this interest."

### **Classification of Rights according to their Objects**

Salmond refers to seven kinds of rights by reference to their objects. (1) There can be *rights over material things*. These are the most important legal rights in respect of their number and variety. Examples are my right to own my car, my land, my house, my furniture, etc.

(2) There are *rights in respect of one's own person*. I have a right not to be killed and the object of this right is my life. I have a right not to be physically injured or assaulted and the object of this right is my bodily health and integrity. Likewise, I have a right not to be coerced or deceived or imprisoned.

(3) There is also the *right of reputation*. By reputation we mean the good opinion that other persons have about a person. A person has as much interest in his reputation as in the money in

his pockets. A person has a right not to be libelled. Such a right has obtained legal recognition and protection.

(4) There are *rights in respect of domestic relations*. Every person has an interest and a right in the society, affections and security of his wife and children. No person is to be allowed to seduce his wife or daughter or take away his child or interfere with his life in any way.

(5) There are *rights in respect of other rights*. A right may have another right as its subject-matter. In the case of an agreement to sell land, the right transferred is a right to the right of ownership which passes only when the sale is completed. By a promise of the marriage, a woman acquires a right to be married. She acquires the rights of a wife on being actually married. There are writers like Gray who distinguish between rights to rights which can be specifically enforced and rights to rights the violation of which gives rise only to some lesser remedy. On making a valid contract to purchase land, a right to the ownership is acquired. A contract to marry only gives a right to be married or to obtain damages in case the engagement is broken. This treats enforcement and not recognition as the essence of a right and on that basis only the distinction seems to be valid.

(6) There are *rights over immaterial property* and examples of such rights are patent rights, copyrights, trade-marks, and commercial goodwill. The object of patent right is an invention and the patentee has a right to its exclusive use. The object of literary copyright is the form of literary expression produced by the author of a book.

(7) There are *rights to services* as well. These rights are created by a contract between master and servant, physician and patient and employer and workmen. In these cases, the object of the right is the skill, knowledge, strength, time, etc., of the person bound. If a physician is hired, the hirer gets a right to the use and benefit of his skill and knowledge. If a person hires a horse, he gets a right to the use and benefit of his strength and speed. The object of a right of personal service is the person of him who is bound to render it. The mind and body of a person constitute an instrument which is capable of certain uses just as a horse or steam-engine is.

### **Legal Rights in a Wider Sense**

The term legal right is also used in a wider sense to include any legally recognised interest whether it corresponds to a legal duty or not. In this generic sense, a legal right may be defined as any addition or benefit which is conferred upon a person by a rule of law. Rights in this sense are of three different kinds, *viz.*, rights in the strict sense, liberties and powers.

(a) As regards the *rights in the strict sense*, there are legally protected interests corresponding to legal duties imposed upon others.

(b) The *legal liberties* of a person are the benefits which he derives from the absence of legal duties imposed upon him. Those are the things which he can do without being prevented by law. A person has a right to do whatever he pleases with himself but he has no right or liberty to interfere with others. He may have a right to express his opinions on public affairs but he has no right to publish a defamatory or seditious libel. He can defend himself against violence but he cannot take the law into his own hands. In *Musgrove v. Toy*, it was held thus : "It is often said that all rights whatever correspond to duties ; and by those who are of this opinion a different explanation is necessarily given of the class of rights which we have just considered. It is said that a legal liberty is in reality a legal right not to be interfered with by other person in the exercise of one's activities. It is alleged that the real meaning of the proposition that I have a legal right to express what opinions I please, is that other persons are under a legal duty not to prevent me from expressing them. So that, even in this case, the right is the correlative of a duty. Now there is no doubt that in most cases a legal liberty of acting is accomplished by a legal right not to be hindered in so acting. If the law allows me a sphere of lawful and innocent activity, it usually takes care at the same time to protect this sphere of activity from alien interference. But in such a case there are in reality two rights and not merely one; and there are instances in which liberties are not thus accompanied by protecting rights. I may have a legal liberty which involves no such duty of non-interference imposed on others. If a landowner gives me a licence to go upon his land, I have a right to do so, in the sense in which a right means a liberty ; but I have no right to do so, in the sense in which a right vested in me is the correlative of a duty imposed upon him. Though I have a liberty or right to go on his land, he has an equal right or liberty to prevent me. The licence has no other effect than to make that lawful which would otherwise be unlawful. The right which I so acquire is nothing more than an extension of the sphere of my rightful activity. So a trustee has a right to receive from the beneficiaries remuneration for his trouble in administering the estate, in the sense that in doing so he does no wrong. But he has no right to receive remuneration in the sense that the beneficiaries are under any duty to give it to him. So an alien has a right, in the sense of liberty, to enter British dominions, but the executive government has an equal right, in the same sense, to keep him out. That I have a right to destroy my property does not mean that it is wrong for other persons to prevent me; it means that it is not wrong for me so to deal with that which is my own. That I have no right to commit theft does not mean that other persons may lawfully prevent

me from committing such a crime, but that I myself act illegally in taking property which is not mine."

(c) According to Salmond, a *power* is an ability conferred upon a person by law to determine, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either all himself or by other persons. According to Halsbury, "A power is an authority reserved by or limited to a person to deal with or dispose of either wholly or partially, real or personal property, either for his own benefit or that of others." According to Paton, "A power is an ability, on the part of a person to produce a change in a given relation by doing or not doing an act." Examples of powers are the right to make a will, the right to alienate property, the power of sale vested in a mortgagee, the right of re-entry on the part of a landlord, the right to cancel a contract on the ground of fraud, etc. These rights have no corresponding duties. The right to make a will does not involve any duty on the part of somebody else. The right of a mortgagee to sell the mortgaged property does not impose any duty upon the mortgagor.

Powers are of two kinds : public and private. Public powers are those which are vested in a person as an agent or instrument of the functions of the state. They comprise the various forms of legislative, executive and judicial authority. Private powers are those which are vested in persons to be exercised for their own purposes and not as agents of the state.

According to Salmond, "A liberty is that which I may do innocently ; a power is that which I can do effectively ; a right in the narrow sense is that which other persons ought to do on my behalf. I use my liberties with the acquiescence of the law. I use my power with its active assistance in making itself an instrument of my will ; I enjoy my rights through the control exercised by it over the acts of others on my behalf."

### **Kinds of Legal Burdens**

According to Salmond, legal burdens are of three kinds, *viz.*, duties, disabilities and liabilities. A duty is the absence of liberty. A disability is the absence of power. A *liability* is the presence either of liberty or of power vested in someone else as against the person liable. An example of a liability is the liability of a trespasser to be ejected forcibly. Likewise, the goods of a defaulting tenant can be seized for rent. There is a liability of a mortgagor to have the property sold by the mortgagee. There is a liability of a judgement-debtor to have execution issued against him. There is a liability of the unfaithful wife to be divorced. The most important form of liability is that which corresponds to the various powers of action and prosecution arising from the different forms of wrong-doing.

A *disability* is the mere absence of capacity of power and can be called "no-power". According to the Indian Penal Code, a child below seven years of age is immune from a criminal trial and the courts are under a disability to try him. Likewise, a minor is under a disability to enter into a contract or make a will.

According to Paton, "An immunity is a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person." Just as a power is a legal ability to change legal relations, likewise an immunity is an exemption from having a given legal relation changed by another. A judge is immune from being punished for whatever he says during the course of the trial. The right of a peer to be tried by peers is an immunity from the power of the ordinary criminal courts. It is neither a right in the strict sense, nor a liberty, nor a power.

A foreign sovereign or an ambassador cannot be tried by the courts of law of the country. This immunity is neither a legal right nor a legal wrong nor a liberty nor a power. It is merely an exemption from the ordinary process of the courts of the land. The members of Parliament cannot be arrested during the session.

### **Rights and Duties of the State**

According to Austin, "The sovereign has no rights and duties. It cannot issue commands against itself or bind itself to anything. Consequently, no subject can own a right against the state." Under the English law, a person is allowed to sue the state in certain cases only when the state allows him to do so. The special procedure of the petition of right has to be followed. The subject has to approach the state in the form of a beggar. He cannot enforce his right.

The state can have no rights. As the state has no political superior over it, there is none to confer a legal right on it. If we suppose that the state has rights, we take away from it its sovereignty. According to Hibbert, to concede rights to state is to confuse might with right. Such a view is based on the fact that sovereignty is unlimited and illimitable. However, that is not the case with sovereignty.

According to Gray, "The state has an indefinite power to create legal rights for itself; but the only legal rights which the state has at any time are those interests which are then protected by the law—that is, by the rules in accordance with which the judicial organs of the state are then acting." According to Pollock, "There seems to be no valid reason against ascribing rights to the state in all cases whether its officers are enjoined or authorised (by law) to take steps for causing the law to be observed and breakers of the law to be punished."

However, according to Holland, the state possesses rights against the subjects and it also owes duties to the subjects. According to Salmond, a subject may claim rights against the state in the same way as against another subject. The right of a subject is not a perfect right as it cannot be enforced. A state cannot enforce a judgment against itself.

A change has been brought about in the law of the country by the passing of the Crown Proceeding Act of 1947. In certain cases, the aggrieved party has been given the power to file a suit against the government. In spite of this, the Crown possesses certain advantages in matters of litigation.

In the case of India, the state has both rights and duties. Legal duties have been imposed upon the state by the Constitution in the form of fundamental rights. There is no provision for a special procedure like that of the petition of right. A suit can be filed against the Union of India and the State Governments and *vice versa*.

### **Estate and Status**

An estate connotes the rights of the owner in the property. Status include not only his rights but also his duties, liabilities and disabilities.

Many *definitions of status* have been given by various writers. According to Austin, "Where a set of rights and duties, capacities and incapacities, specially affecting a narrow class of persons, is detached from the bulk of the legal system and placed in a separate head for the convenience of exposition, that set of rights and duties, capacities and incapacities, is called status." According to Scott, L. J., "Status is in every case the creation of substantive law; it is not created by contract although it may arise out of contract, as in the case of marriage where the contract serves as the occasion for the law of the country of the husband's domicile to fix the married status of the parties to the contract." According to Allen, status is "the conditions of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities and incapacities or both." According to Westlake, status is "the sum of liberties in which a person's condition differs from that of the normal man." According to Brett, L. J., "The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community." The status of a person is not defined by contract or agreement but by law.

According to Sir Henry Maine, status means a legal condition in which rights and duties are imposed by the operation of law. The status of a person is determined without his consent. Marriage creates status in this sense. Although it comes into existence by the agreement of the parties, it cannot



be dissolved at the will of the parties and they are bound by the legal conditions imposed by law. According to Sir Henry Maine, the movement of progressive society has been from *status* to *contract*.

Dicey refers to seven particular kinds of status, *viz.*, parent and child, guardian and ward, infancy, legitimacy, husband and wife, lunatic and curator and corporation.

### **Rights of Beneficiary**

The right of the beneficiary in trust property is an equitable right. The beneficiary is an equitable owner and the trustee is the legal owner. However, there is a difference of opinion whether the rights of the beneficiary are rights *in rem* or rights *in personam*.

Historically, the right of a beneficiary was regarded to be a right *in personam*. The right was available against the trustee personally. However, things changed later on. The limitation of binding the trustee personally was removed and now the right of a beneficiary is considered to be of a proprietary nature. The beneficiary has a right in trust property against the whole world except in case of a *bona fide* purchaser for value and without notice of the trust.

According to Maitland, Langdell and Amos, the right of a beneficiary is a right *in personam*. A trust binds only a certain class of persons and not the world at large. It was held in the case of *Burgess v. Wheate* that the right of the beneficiary is a personal one and cannot pass to the Crown by escheat. In another case, it has been held that death duties are liable to be paid in England if the trustee lives in England although the property is situated outside England.

According to another view, the right of a beneficiary is a right *in rem*. The beneficiary is the owner of trust property. It is the duty of the trustee to hold the trust property for the benefit of the beneficiary. This is not only the view of Hohfeld but also of the House of Lords.

Paton points out that it is frequently contended that the right of the beneficiary is not a right *in rem* as it is not available against a *bona fide* purchaser for value and it is not merely a right *in personam* against the trustee. However, if we admit that a right is not *in rem* merely because it can be defeated by a particular class of purchaser, the same argument applies not only to the beneficiary but also the whole class of negotiable instruments. He asks the question whether a person has no right *in rem* to his money merely because another person who receives it for value and in good faith acquires the superior title although the same was originally taken from him by a thief.

The view is that the right of a beneficiary is a right *in rem* and not *in personam*. However, the matter has not been finally concluded.

### **Kinds of Legal Rights : (1) Perfect and Imperfect Rights**

Legal rights have been variously classified. According to Salmond, a perfect right is one which corresponds to a perfect duty. A perfect duty is one which is not merely recognized by law but also enforced by law. In all fully developed legal systems, there are rights and duties which, though recognized by law, are not of a perfect nature. Those rights are called imperfect rights. Examples of imperfect rights are the claims barred by the lapse of time, claims which cannot be enforced on account of the absence of some special form of legal proof, claims against foreign states or sovereigns, claims which cannot be enforced as they do not lie within the local limits of the jurisdiction of the court, debts due to an executor from the estate which he administers. In these cases, the rights and duties are imperfect as no action lies for their maintenance. The law of limitation does not destroy a right but it merely provides that the right cannot be enforced through the agency of law. An imperfect right may be good as a ground of defence, though not good as a ground of action. If a contract is not properly executed, the courts of law refuse to enforce the same but if money comes into the hands of the person in whose favour the contract has been executed, he can appropriate the same and take up the plea that the payment is in pursuance of the contract. An imperfect right is sufficient to support any security that has been given for it. An imperfect right may become perfect. The right of action may be dormant and not non-existent. A verbal contract may become enforceable on account of the fact that a written evidence of the contract comes into existence. Likewise, part-payment of a time-barred debt makes the right a perfect one.

### **(2) Positive and Negative Rights**

According to Salmond, a positive right corresponds to a positive duty and entitles its owner to have something done for him without the performance of which his enjoyment of the right is imperfect and incomplete. Negative rights have negative duties corresponding to them and enjoyment is complete unless interference takes place. The majority of negative rights are against all the world.

My right to the performance of a contract of service is a positive one. If another person owes some money to me, my right to the money in the pocket of that person is a positive one. If I have some money in my pocket, my right to it is a negative right. The right of a first possessor to quiet enjoyment is a negative one. It corresponds to the negative duty of all others not to interfere.

In the case of positive rights, the person subject to the duty is bound to do something. In the case of a negative right, others

are restrained from doing something. The satisfaction of the positive rights results in the betterment of the position of the owner. In the case of negative rights, the position of the owner is merely maintained as it is. In the case of positive rights, the relation between the subject and object is mediate and the object is attained by the help of others. In the case of negative rights, the relation is immediate. There is no necessity of any outside help. All that is required is that others should refrain from interfering. In the case of positive rights, a duty is imposed on one or a few persons. In the case of negative rights, the duty is imposed on a large number of persons.

### (3) Real and Personal Rights

According to Salmond, a real right corresponds to a duty imposed upon persons in general. A personal right corresponds to a duty imposed upon determinate individuals. A real right is available against the whole world. A personal right is available only against a particular person. My right to the possession and use of money in my purse is a real right. However, my right to receive money from a person who owes me, is a personal right. I have a real right against every one not to be deprived of my liberty or reputation. I have a personal right to receive compensation from any individual who in any way harms me. I have a real right to use and occupy my house but I have a personal right to get some accommodation in some hotel.

Real rights are more important than personal rights as they are available against the whole world. The right of a patentee is much more valuable than the right of a person who has purchased the goodwill of business from another person.

According to Salmond, all real rights are negative and most personal rights are positive although in a few exceptional cases they are negative. A real right is nothing more than a right to be left alone by others. It is merely a right to their passive non-interference. No person can have a legal right to the active assistance of all the world. The only duties which can be expected from the whole world are of a negative character.

Although all legal rights are negative, it is not true that all personal rights are positive. This is so in most of the cases. However, there are certain cases in which rights are both negative and personal. These are usually the product of some agreement by which some particular individual deprives himself of a liberty which is enjoyed by others. While traders can compete with me, the person whose goodwill of a business I have purchased, is restrained from competing with me, I have the right of exemption from competition from that person and that right is both personal and negative. My right is protected against a particular individual alone.

It is to be observed that real rights are rights *in rem* but personal rights are rights *in personam*. Real rights are always negative rights but personal rights are generally positive rights. A real right is protected against the whole world but a personal right avails against a determinate person or persons.

#### (4) *Rights in rem and rights in personam*

These terms are derived from the Roman terms, "Actio in rem" and "Actio in personam." An Actio in rem was an action for the recovery of dominium. The plaintiff claimed that a certain thing belonged to him and the same ought to be restored or given to him. An actio in personam was one for the enforcement of an obligatio. In such a case, the plaintiff claimed the payment of money, the performance of a contract or the protection of some other personal right vested in him as against the defendant. The right protected by an actio in rem came to be called Jus in rem and a right protected by actio in personam came to be called Jus in personam. These terms were invented by the commentators on civil law and are not to be found in the original sources.

Literally interpreted, Jus in rem means a right against or in respect of a thing. Jus in personam means a right against or in respect of a person. As a matter of fact, every right is at the same time one in respect of something and against some person. Every right involves not only a real but also a personal relation. Although the two relations exist together, their relative importance is not the same. In real rights, it is the relation to the thing which is very important. In the case of personal rights, it is the relation to other persons who owe the duties which is important. Real rights are usually derived from some special relation to the object but personal rights are derived from special relation to the individual or individuals under the duty.

A right in rem is available against the whole world but a right in personam is available against a particular individual only. A right in rem is available against persons generally. Examples are rights of ownership and possessions. My right of possession and ownership is protected by law against all those who may interfere with the same. A right in personam corresponds to a duty imposed upon determinate persons. Rights under a contract are rights in personam as the parties to the contract alone are bound by it. The right of a creditor against a debtor is a right in personam. The same is the case with the right of a landlord to recover rent from a tenant. However, my right to reputation is a right in rem. I have a right to prosecute all those who dare to libel me. Rights in rem are almost always negative. Those are rights to be left alone. Rights in personam are usually positive and negative only in exceptional cases. This is so in the case of sale of goodwill when the seller promises not to set up a rival business within a particular locality and for a specific period. The

right of the purchaser is both negative and in personam. He acquires the right of exemption from competition from the seller.

### **(5) Proprietary and Personal Rights**

The proprietary rights of a person include his estate, his assets and his property in many forms. Proprietary rights have some economic or monetary value. Examples of proprietary rights are the right to debt, the right to goodwill, the right to patent, etc. Proprietary rights are valuable but personal rights are not valuable. Proprietary rights are the elements of the wealth of a man. Personal rights are merely elements in his well-being. Proprietary rights possess, not merely juridical but also economic importance. Personal rights possess merely juridical importance.

The distinction between the proprietary and personal rights is not confined to rights in the strict sense of the term but applies to other classes of rights as well. The estate of a person is made up not merely of his valuable claims against other persons but also of such of his powers and liberties as are either valuable in themselves or are accessory to other rights which are valuable. A general power of appointment is proprietary but the power of making a will or a contract is personal. A liability to be sued for a debt is proprietary but a liability to be prosecuted for a crime is personal. The duty of fulfilling a contract for the purchase of goods is proprietary, but the duty of fulfilling a contract to marry is personal. The status of a person is made up of his personal rights, duties, liabilities and disabilities. The same person may have at the same time the status of a free man, a citizen, a husband, a father, etc. When we speak of the status of a wife, we refer to all her personal benefits and burdens arising out of marriage. In the same way, we speak of the status of an alien, a lunatic or an infant. The true test of a proprietary right is not whether it can be alienated but whether it is equivalent to money. It may be equivalent to money although it may not be possible to sell it for a price. A right to receive money or something which can itself be turned into money, is a proprietary right and is to be counted as a part of the estate of the possessor although the same may not be alienable.

### **(6) Rights in re propria and Rights in re aliena**

According to Salmond, a right in re aliena or encumbrance is one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. All other rights are rights in re propria. These two terms were invented by the commentators on civil law and are not to be found in the original sources. The owner of a chattel has Jus in re propria or a right over his own property. The pledge has Jus in re aliena or a right over the property of some one else. Rights in re propria are rights in one's own property. These are complete rights to which other rights can be attached.

Rights in re aliena are rights over the property of another person. These rights derogate from the rights of other persons and add to the rights of their holder. My right of ownership of my land is a right in re propria. My right of way across the land of another person is a right in re aliena. My right of way is the dominant right. A dominant right is an encumbrance and a servient right is subject to an encumbrance. In the case of a landlord and tenant, the lessee has a dominant right in re aliena and the lessor has a servient right in re propria.

There are four main classes of encumbrances, *viz.*, leases, servitudes, securities and trusts. A lease is the encumbrance of property vested in one man by a right to the possession and use of it vested in another. A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by possession of it. Examples of servitudes are the right of way, the right to the passage of light or water across an adjoining land, etc. A security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt. An example of security may be the right to retain possession of a thing till the payment of the debt. A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of some one else. The owner of the encumbered property is called the trustee and the owner of the encumbrance is called the beneficiary.

### **(7) Principal and Accessory Rights**

Principal rights exist independently of other rights. Accessory rights are appurtenant to other rights and they have a beneficial effect on the principal rights. A security is accessory to the right secured. A servitude is accessory to the ownership of the land for whose benefit it exists. The rent and covenant of a lease are accessory to the ownership of the property by the landlord. Covenants for title in a conveyance are accessory to the estate conveyed. A right of action is accessory to the right for whose enforcement it is provided.

X owes money to Y and he executes a mortgage deed in favour of Y. The debt is the principal right and the security in the form of mortgage is the accessory right. The security has a beneficial effect on the principal right of recovery. The mortgage continues so long as the debt is not paid and is extinguished when the debt is paid off. X has a piece of land and as the owner of that land, he has the right of way on the adjoining land. The ownership of the land by X is the principal right. The right of way in the adjoining land is the accessory right. When the land is sold by X, the accessory right of way is also lost. A dominant right is generally an accessory right. There is an exception in the case of a lease which is a dominant right and not an accessory right.

### **(8) Legal and Equitable Rights**

Legal rights were recognized by common law courts and equitable rights were recognized by the Court of Chancery. The Judicature Act of 1873 did not put an end to the distinction between legal and equitable rights. Although no court now recognizes the distinction between legal and equitable rights, the distinction is still of great importance. The methods of their creation and disposition are different. A legal mortgage must be created by deed but an equitable mortgage may be created by a written agreement or by the deposit of title deeds. The same is the case with legal and equitable leases. Equitable rights have a more precarious existence than legal rights. When there are two inconsistent legal rights claimed by different persons over the same thing the first in time prevails. The same is the case when there is a competition of two inconsistent equitable rights. However, when there is a conflict between a legal right and an equitable right, the legal right prevails and destroys the equitable right even if it is subsequent to the equitable right in origin, but the owner of the legal right must have acquired it for value and without notice of the prior equity. If there is a competition between a prior equitable mortgage and a subsequent legal mortgage, preference is given to the subsequent legal mortgage. The rule is that where there are equal equities, the law prevails.

### **(9) Primary and Secondary Rights or Antecedent and Remedial Rights**

Primary rights are also called antecedent, sanctioned or enjoyment rights. Secondary rights are called sanctioning, restitutory, or remedial rights. Many writers prefer to use the term antecedent and remedial but Pollock prefers to use the term substantive and adjectival rights. He does so on the ground that the term remedial does not apply to interpleader proceedings and payment of money into court by a trustee where the first step is taken not "against someone else's breach of duty but against the risk of unwilling breach of duty on his own part." Primary rights are those rights which are independent of a wrong having been committed. They exist for their own sake. They are antecedent to the wrongful act or omission. Examples of primary rights are the right of reputation, the right in respect of one's own person, the right of the owner of a guardian, etc. Secondary rights are a part of the machinery provided by the state for the redress of injury done to primary rights. Their necessity arises on account of the fact that primary rights are very often violated by persons. Secondary rights come in the form of remedial rights.

### **(10) Public and Private Rights**

A public right is possessed by every member of the public. When one of the persons connected with the right is the state and the other is a private person, the right is called a public

right. A private right is concerned only with individuals. Both the parties connected with this right are private persons. Private rights are of an infinite variety and are enjoyed by individuals who happen to own certain property, who hold a certain office, who enter into a contract, etc.

Public and private rights differ in the same way as public and private wrongs differ. According to Blackstone, "Wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals and are there-upon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community (or the state) considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanours." However, Salmond pointed out that all public wrongs are not crimes. The breach of a public trust is a public wrong but the method of redress is a civil one. Moreover, all crimes are not public wrongs. Many minor offences can be punished at the instance of a private person.

### **(11) Vested and Contingent Rights**

A vested right is a right in respect of which all events necessary to vest it completely in the owner have happened. No other condition remains to be satisfied. In the case of a contingent right, only some of the events necessary to vest the right in the contingent owner have happened. If a valid deed of transfer is executed by A in favour of B, B acquires a vested right. All formalities are complete and nothing remains to be done. However, if a property is given to a person on the condition that he will be entitled to take possession of it only if he attains the age of 21, the right acquired is a contingent right. The right fails if the person dies before he attains the age of 21.

According to Paton, "When all the investitive facts which are necessary to create the rights have occurred, the right is vested; when part of the investitive facts have occurred, the right is contingent until the happening of all the facts on which the title depends."

### **(12) Municipal and International Rights**

Municipal rights are conferred by the law of a country. International rights are conferred by international law. All municipal rights are enjoyed by the individuals living in a country. The subjects of international rights are the persons recognized as such by international law. There is no unanimity of opinion as to who are the international persons recognized by international law. According to one view, only the states are the subject of international law. According to another view, individuals can also be the subject of international law.



### (13) Rights at Rest and Rights in Motion

This classification of rights has been given by Holland. According to him, when a right is stated with reference to its 'orbit' and its 'infringement', it is a right at rest. The meaning of the term 'orbit' is the sum or the extent of the advantages conferred by the enjoyment of the rights. The term 'infringement' means an act which interferes with the enjoyment of those advantages. Causes by which rights are either connected or disconnected with persons are discussed under rights in motion. Hibbert points out that this classification leaves no place for the treatment of absolute duties. He suggests the substitution of the term 'duty' for the term 'right'.

### Jus ad Rem

A Jus ad Rem is a right to a right. The person of inheritance has the right to have some other right transferred to him. The Jus ad Rem is always a right in personam. If I sell my house to K, K acquires a right against me to have the house transferred to himself. The right of K is said to be a Jus de Rem.

### Status

According to Austin, "Where a set of rights and duties, capacities and incapacities specially affecting a narrow class of persons, is detached from the bulk of the legal system and placed under a separate head for convenience of exposition, that set of rights and duties, capacities and incapacities, is called a statute." The status is the aggregate of rights and duties of a person as a member of a class.

According to Salmond, the term 'status' applies to the personal rights and duties of an individual as distinct from his proprietary rights and duties which have an economic value.

According to Dr. Allen, status is "the condition of belonging to a particular class of persons to whom law assigns certain peculiar legal capacities or incapacities or both." The term 'capacity' means the power of acquiring rights. The status depends upon defective capacity or peculiar capacity.

According to Sir Henry Maine, "status" is the legal condition in which rights and duties are imposed by the operation of a law, as distinct from the conditions in which they are acquired by the voluntary act of an individual. The legal conditions of the individual must be the result of circumstances beyond his control. Pollock points out that Maine's exclusion from the head of status of "conditions which are the immediate or a remote result of agreement" involves a sensible narrowing of the term status.

According to Anson, "The essential feature of a status is that the rights and liabilities affecting the class which constitute each particular status are such as no member of the class can vary by contract."

### **Suggested Readings**

- Allen : Legal Duties.
- Austin : Jurisprudence.
- Buckland : Some Reflections on Jurisprudence.
- Hohfeld : Fundamental Legal Conceptions.
- Kelsen : General Theory of Law and State.
- Kocourek, A. : Jural Relations.
- Mises, Von : Positivism.
- Olivecrona : Law as Fact.
- Paton : Jurisprudence.
- Salmond : Jurisprudence.
- Stone : The Province and Function of Law.

## CHAPTER XIV

### OWNERSHIP AND POSSESSION

#### **Ownership**

The conception of ownership is one of the fundamental juristic conceptions common to all systems of law. This conception has been discussed by most of the writers before that of possession. However, it is pointed out that it is not the right method. Historically speaking, the idea of possession came first in the minds of people and it was later on that the idea of ownership came into existence. The idea of ownership followed the idea of possession.

#### **Development of the idea of ownership**

The idea of ownership developed by slow degrees with the growth of civilization. So long as the people were wandering from place to place and had no settled place of residence, they had no sense of ownership. The idea began to grow when they started planting trees, cultivating lands and building their homes. The transition from a pastoral to an agricultural economy helped the development of the idea of ownership. People began to think in terms of "mine and thine". To begin with, no distinction was made between ownership and possession. However, with the advancement of civilization, the distinction became clearer and clearer. This distinction was made very clearly in Roman law. Two distinct terms were used to point out the distinction and those were 'dominium' and 'possessio'. Dominium denoted the absolute right to a thing. Possessio implied only physical control over a thing. The English notion of ownership is similar to the conception of dominium in Roman law. According to Holdsworth, the English law reached the conception of ownership as an absolute right through developments in the law of possession.

#### **Definition of ownership**

According to Keeton, "The right of ownership is a conception clearly easy to understand but difficult to define with exactitude. There are two main theories with regard to the idea of ownership. The great exponents of the two views are Austin and Salmond. According to one view, ownership is a relation which subsists between a person and a thing which is the object of ownership. According to the second view, ownership is a relation between a person and a right that is vested in him."

#### **Austin's view of ownership**

According to Austin, "Ownership means a right which avails against every one who is subject to the law conferring the right

to put thing to user of indefinite nature." Full ownership is defined as "a right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration." It is a right in rem which is available against the whole world.

(1) According to Austin, the *first attribute* of ownership is that it is indefinite in point of user because the thing owned may be used by the owner in very many ways. The owner of land may build a house on it. He may use it for cultivation. He may convert it into a garden. He may make any use of it he pleases. However, restrictions may be imposed on the use of the thing by means of an agreement or by the operation of law. The owner may mortgage the land to somebody for a specific period and also hand over the possession of the same. He may lease the land to somebody for a specified number of years. He may create an easement in favour of another person. The owner of the land cannot be allowed to use the same in a way which is injurious to others. Reference may be made to two maxims in this connection. The first maxim is, "So use your own property as not to injure your neighbour's." The second maxim is, "It is not lawful to build upon your land to the injury of another." In the case of *Crowhurst v. Amersham Burial Board*, the Burial Board was held responsible for damages to the extent of the price of the horse which died on account of eating a portion of a yew tree planted by the Burial Board on its own land and about 4 feet from its boundary railings. The horse was grazing in a neighbouring meadow and died of the poison in the leaves of that tree. The owner of a piece of land cannot erect a building on his land in such a way as to interfere with the use of the adjoining property.

(2) The *second attribute* of ownership is a right of transfer or disposition without any restriction. However, experience shows that in all advanced legal systems, certain restrictions are imposed on the right of disposal of the owner. The transfer of property is not allowed if its object is merely to defeat or delay the creditors. In the case of France, certain restrictions are imposed on the right of alienation in the interests of the family. In the case of Germany, transfer or division of small farms is not allowed.

(3) The *third attribute* of ownership is the permanence of the right of ownership. This right exists so long as the thing exists. The right is extinguished with the destruction of the thing. Ownership is inherited by his successor.

Austin's view of ownership has been criticized on various grounds. (1) It is pointed out that ownership is not a right but a bundle of rights. It is the aggregate or sumtotal of the rights of user and enjoyment. Even if some of the rights are removed and given to another person, the person in whom vests the residue is still the owner. The owner of a piece of land may mortgage the same to another person. Although he has transferred a right, he is still the owner.

(2) Ownership is not merely a right but also a relationship between the right owned and the person owning it.

(3) The idea of the right of indefinite user is also attacked. Many limitations can be put upon that user. The owner must use his property in such a way as not to interfere with the rights of others. He may have to pay taxes to the state in connection with the property. He may not have the right to exclude the officers of the government who are entitled to enter upon it on certain grounds. In the case of joint ownership of property, the rights of each are controlled by those of others. Restrictions may be imposed upon ownership by encumbrances. Restrictions may also be imposed on the power of disposition of property by owners. An owner of property is not allowed to dispose of the same with a view to defeat or delay his creditors. There are certain disabilities imposed on infants and lunatics with regard to the disposal of property.

### **Holland on ownership**

The view of ownership as given by Austin has also been followed by Holland. Holland defines ownership as "a plenary control over an object." According to him, an owner has three kinds of powers, *viz.*, possession, enjoyment and ownership. However, the same can be lost by means of a lease or mortgage. "The right of enjoyment implies a right of user and of acquiring the fruits or increase of the things as timber, the young cattle or soil added to an estate by alluvion. The right is limited only by the rights of the state or of other individuals". The right of disposition implies the right of alteration, destruction or alienation of property.

### **Markby**

Markby also holds similar views. To quote him, "If all the rights over a thing were centred in one person that person would be the owner of the thing ; and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it and another right to till it ; the owner of a piece of furniture has not one right to repair it and another right to sell it ; all the various rights which an owner has over a thing are conceived as merged in one general right of ownership".

### **Hibbert**

According to Hibbert, ownership involves four rights and those are the right of using the thing, excluding others from using it, the disposal of the thing and the destruction of the thing. Under the English law, no one can have absolute ownership in land as land cannot be destroyed. One can have merely an estate

in it. An estate means the legal interest of a party in land measured by duration and entitling the party to put the land to uses of an indefinite nature.

### **Paton**

According to Paton, the rights of an owner are the power of enjoyment, the right of possession, the power to alienate *inter vivos* or to charge as security, and the power to leave the rest by will.

According to *Hohfeld*, ownership is a collection of rights, privileges and powers, some of which are frequently found to reside, either for a limited period or perpetually, in persons other than the owner. Ownership is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. As we can take one drop or many drops from the bucket, likewise we can detach one or several rights from ownership.

According to *Buckland*, ownership is "the ultimate right to the thing or what is left when all other rights vested in various people are taken out."

According to Noyes, ownership is magnetic core which remains when all present rights of enjoyment are removed from it and which attracts to itself the various elements temporarily held by others as they lapse.

According to Pollock, "Ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power at all, though we are familiar with 'limited owners' in recent usage. If we found anywhere a system of law which did not recognise alienation by acts of parties at all, we should be likely to say not that the powers of an owner were very much restricted in that system, but that it did not recognise ownership. The term, however, is not strictly a technical one in the Common Law. . . . . We must not suppose that all the powers of an owner need be exerciseable at once and immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment, and suspend his power of disposal, provided that he reserves, for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power. This is the common case of hiring land, buildings, or goods. Again, the owner's powers may be limited in particular directions for an indefinite time by rights as permanent in their nature as ownership itself. Such is the case where the owner of Whiteacre has a right of way over his neighbour's field of Blackacre. As this example shows, what is thus subtracted from one owner's powers is generally added to another's. In short, the owner of a thing is not

necessarily the person who at a given time has the whole power of use and disposal ; very often there is no such person. We must look for the person having the residue of all such powers when we have accounted for every detached and limited portion of it ; and he will be the owner even if the immediate power of control and use is elsewhere. In the same way a ruler does not cease to be a sovereign prince merely because he has made a treaty by which he has agreed to forgo or limit the exercise of his sovereign power in particular respects." (Jurisprudence and Legal Essays, Pp. 97-98).

### **Salmond on ownership**

According to Salmond, "Ownership, in its most comprehensive signification, denotes the relation between a person and right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely, the fee simple of it." Again, "Ownership, in this generic sense, extends to all classes of rights, whether proprietary or personal, in rem or in personam, in re propria or in re aliena. I may own a debt, or a mortgage or a share in a company, or money in the public funds, or a copyright or a lease or a right of way, or a power of appointment, or the fee simple of land. Every right is owned, and nothing can be owned except a right. Every man is the owner of the rights which are his." According to Salmond, ownership is a relation between a person and any right that is vested in him. That which a man owns is a right and not a thing. To own a piece of land means to own a particular kind of right in the land.

### **Criticism**

(1) Salmond's view of ownership has been criticised by many writers. According to Duguit, ownership is a relationship between a person and a thing over which he is permitted, on account of this relationship, complete disposal, use and enjoyment. What is owned is a thing and not a right.

(2) According to Cook, there are many rights which a person may possess and to use the term owner to express the relationship between a person and a right is to introduce unnecessary confusion. Ownership is the name given to the bundle of rights.

(3) According to Kocourek, ownership is a relationship of the owner and a right to a thing which can be economically enjoyed. The right of ownership is a matter of legal protection.

The apologists of Salmond point out that Salmond has defined ownership in two different senses. In the comprehensive sense, ownership denotes the relation between a person and any right that is vested in him. In this sense, it includes both corporeal and

incorporeal ownership. In a narrow sense, ownership is a relationship between a person and a material thing. In this sense, corporeal ownership is included. To quote Salmond, "Although the subject-matter of ownership in its widest sense is in all cases a right, there is a narrow sense of the term in which we speak of the ownership of material things. We speak of owning, acquiring or transferring, not rights in land or chattels, but the land or chattels themselves. This was the original and still is the commonest meaning of the word 'ownership'. We call it by the name of corporeal ownership to distinguish it from the ownership of rights which may be called 'incorporeal ownership.'"

### **Characteristics of ownership**

There are certain characteristics of ownership as such. (1) It is absolute or restricted. An owner of a property may be its absolute owner and nobody else may have any interest in the same. It is also possible that there may be certain restrictions on the right of ownership and those restrictions may be imposed by law or by voluntary agreement. An owner may lease out his property. He may mortgage the same. Thus, he comes to have a limited ownership. A compulsory restriction may be imposed on ownership if another person comes to have an easement on a particular property.

(2) It is also possible that certain restrictions may be imposed on the owners of property in times of national emergency. The house of any owner may be requisitioned and any compensation may be fixed by the prescribed authority. The Government may appoint some authority to control the rents charged by the owners of property.

(3) The Government may demand certain taxes from the owners of property. If those taxes are not paid, the Government may confiscate their property or dispose of that portion of property which is necessary to realise the money due to the Government.

(4) The owner of a property is not allowed to use his property in such a way as to interfere with the enjoyment of the property of others. In the case of *Reylands v. Fletcher*, it was held that if a person brings on his land anything which if it should escape may cause damage to his neighbours, he does so at his peril. If that thing escapes and causes injury, he is responsible for the same even if he was careful to take all the necessary precautions to prevent the damage.

(5) The right of the owner to dispose of his property is not unrestricted. The state can impose certain restrictions in this matter. No owner is allowed to transfer his property in such a way as to delay or defraud his creditors. After the partition of India, the Muslims in India were not allowed to dispose of their property with a view to migrate to Pakistan. The transfer of property to an alien may also be prohibited by law.



(6) Certain disabilities have been imposed on infants and lunatics with regard to the disposal of property. Obviously, they are not competent to enter into valid contracts. They are not expected to understand and appreciate all the implications of their actions.

(7) The ownership of a person does not finish with his death. He is entitled to leave his property to his successors. The owner can distribute the property even in his own life-time.

### **Mode of acquisition of ownership**

There are two modes of acquisition of ownership and those are *original* and *derivative*. There are three kinds of original modes of acquisition. Ownership is absolute when the same is acquired over previously ownerless objects. Ownership is extinctive if the ownership of a previous person is finished on account of adverse possession by the acquirer. It is accessory if the ownership is acquired as a result of accession. Absolute ownership can be acquired in two ways and those are by means of occupation and 'specification'. The rule in the case of an ownerless thing is that the first occupier becomes the owner. The physical control of the thing is essential in the case of occupation. Such an ownership is acquired in the case of wild animals, birds, fish in rivers, precious stones, gems, etc. The English law on the subject is that fish and wild animals are in the possession of the person on whose land they are found. The landowner is their owner even if the fish are captured or the wild animals are killed. In the case of hidden treasures, the same belong to the Crown in England. Under the Roman law, the treasure was divided equally by the finder and owner of the place. In the case of specification, materials belonging to one person are given a new shape. Clay may belong to one person but the sculptor may make a statue out of it.

Original ownership may be acquired by a long and continuous and undisputed possession of a thing as owner. The principle of adverse possession works in this connection. The ownership of one person is extinguished and that of another is created. Original ownership can also be acquired by means of accession. The owner of a tree has the right to the fruits of the tree. Likewise, the owner of land has the right to the crop grown on it. The owner of an animal has the right to its offsprings. If some land is added on account of a change in the course of the river, the same is acquired by the owner of the property adjoining it.

### **Different kinds of ownership**

Experience shows that there are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership, and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co-ownership and joint ownership and absolute and limited ownership.

### **(1) Corporeal and incorporeal ownership**

Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trade-mark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things. Incorporeal ownership is described as ownership over intangible things. Corporeal things are those which can be perceived and felt by the senses and incorporeal things are those which cannot be perceived by the senses and which are intangible. Incorporeal ownership includes ownership over intellectual objects and encumbrances.

### **(2) Sole ownership and co-ownership**

Ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. Two or more persons may have the same right vested in them. This may be done in many ways and one of them is that of co-ownership. The right is an undivided unity. By means of a partition, the co-ownership can be ended and the parties concerned can have their own separate shares. The members of a partnership are co-owners of the partnership property. When the right of ownership is vested exclusively in one person, it is called sole ownership. According to Salmond, "Co-ownership, like all other forms of duplicate ownership, is possible only so far as law makes provision of harmonising in some way, the conflicting claims of the different owners *inter se*. In the case of co-owners, the title of the one is rendered consistent with that of the others by the existence of the reciprocal obligations of restricted use and enjoyment."

### **(3) Legal and equitable ownership**

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. Before the passing of the Judicature Acts of 1873 and 1875, there were two kinds of courts in England with separate jurisdictions. Those courts were known as the common law courts and the Chancery or equity courts. The rights recognised and protected by the common law courts were called legal rights and the rights recognised and protected by the equity courts were called equitable rights. The courts of common law refused to recognise equitable ownership and maintained that the equitable owner was not an owner at all. According to Keeton, "Equitable ownership always predicates an outstanding legal ownership, the legal owner being restrained by the rules of equity from using his legal ownership to the detriment of the equitable owner. On the other hand, legal ownership does not necessarily imply the existence of an equitable owner. The property legis-

lation of 1925 has made use of this conception of dual ownership in order to facilitate the transfer of real property in England. Many interests which may exist with regard to land and otherwise would tend to impede the disposition of it, are now permitted to exist as equitable interests only, and it is enacted that a purchaser of a legal estate, provided that the requisite formalities are observed, may obtain a clear title, free from most equitable interests, which operate upon the purchase money. A good example is the life-interest. Formerly, this could exist both as a legal and as an equitable estate. Now, it may exist as an equitable interest only. The most common example of equitable ownership is that which exists under a trust."

#### (4) Vested and contingent ownership

Ownership is either vested or contingent. It is vested when the title of the owner is already perfect. It is contingent when his title is yet imperfect but is capable of becoming perfect on the fulfilment of some conditions. In the case of contingent ownership, he owns the right merely conditionally. If I am the owner of a house on the condition that I shall pay a specific amount of money annually to the Government, my ownership is conditional. The right of a Hindu widow over the property of her husband is conditional on her continuing to be a widow. Her right finishes if she gets remarried. A property may be transferred to a person on the condition that he marries a particular woman. The ownership of the property does not vest in him until he fulfils that condition.

According to Keeton, "Vested ownership exists when the right is fully and finally assigned to some specific individual even though his ownership is not to arise until some future period. In contingent ownership, however, there is an assignment of the right upon a condition which is to be fulfilled in the future. In such a case, ownership is not acquired unless the condition is fulfilled."

Contingent ownership does not necessarily mean that its existence is contingent. A right need not be a contingent right merely because it is owned contingently. The right does exist although it is inchoate as being not vested. Contingent ownership is to be distinguished from the mere possibility of a future acquisition or mere *spes acquisitionis*. Contingent ownership is an existing right and *spes acquisitionis* is a mere chance. If there is a possibility of a person succeeding to the property of his maternal uncle, this does not give rise to contingent ownership. If a person is contemplating to buy a house, it cannot be said that he is the contingent owner of the house.

If a land is granted to A for life and then to B. B has vested ownership of the land. Even if he is not alive at the death of A, his heir will enjoy the benefit of it. However, if a land is granted to A for life and then to B if he shall survive A, the ownership

of B is contingent as it depends upon the condition that he survives A. There is a promissory note in favour of X. X transfers the same to Y on the condition that he marries the daughter of Z. When Y marries the daughter of Z, the right becomes the vested right and his ownership becomes vested ownership. However, before marriage, the right is contingent.

### **Condition precedent and condition subsequent**

There is a fundamental distinction between a condition precedent and a condition subsequent. A condition precedent is one the fulfilment of which completes an inchoate title. A condition subsequent is one the fulfilment of which extinguishes a title already completed. A condition precedent always comes before the creation of an interest. The condition subsequent always follows the vesting of an interest which is already complete. The right is contingent in the case of a condition precedent and it is already vested in the case of a condition subsequent. If the condition precedent is satisfied, the vesting of the right becomes complete although the same was being held conditionally before. A condition subsequent completes the loss of a right already lost conditionally.

X wills his property to Y, his wife, on the condition that on her marriage, the same would be passed on to his sons, A and B. When X dies, the ownership of the property vests in Y and A and B have contingent ownership. If Y remarries, she is divested of her vested ownership and the contingent ownership of A and B becomes vested ownership. What is a condition subsequent for Y is a condition precedent for A and B.

### **(5) Trust and beneficial ownership**

Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same time. The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the beneficiary and his ownership is called beneficiary ownership. The ownership of a trustee is, in fact, nominal and not real. However, in the eye of law, the trustee represents his beneficiary.

### **(6) Co-ownership and joint ownership**

According to Salmond, "Co-ownership may assume different forms. Its two chief kinds in English law are distinguished as ownership in common and joint ownership. The most important difference between these relates to the effect of death of one of the co-owners. If ownership is in common, the right of a dead man descends to his successors like other inheritable rights, but on the death of one of two joint-owners, his ownership dies with him and the survivor becomes the sole owner by virtue of this right of survivorship or *jus accrescendi*."

### (7) Absolute and limited ownership

An absolute owner is one in whom are vested all the rights over a thing to the exclusion of all. This means that excepting this absolute owner, there is no other person who has any claim whatsoever to the thing in question. However, this does not mean that he can use his property in any way he likes. Restrictions can be imposed by law and also by voluntary agreement. If a person holds an estate for life, he can be called the limited owner of it. Under the Hindu law, a Hindu widow has limited ownership over the property. All that she can do is to enjoy the property for her life-time. A purchaser of property from a Hindu widow has to be very cautious as she cannot dispose of her property in any way she likes. Her right of ownership is a limited one.

### (8) Trust and Contract

A distinction may be made between a trust and a contract. A trust is not created by a contract. It also does not give rise to any contractual relationship. If a trust were a contract, only the author of the trust could take action against the trustee. However, under the law, a beneficiary is also entitled to bring an action against the trustee. A trust is not a contract between a trustee and the author of the trust.

### (9) Trust and Agency

Likewise, a distinction has also to be made between a trust and an agency. A trustee is not an agent. This is due to the fact that the agent merely carries out the directions of his principals and his actions are the actions of his principals. In the case of a trust, no beneficiary is allowed to give instructions to the trustee. However, the author of the trust could give the necessary directions while creating the trust. A trustee is an owner in the eye of law, but the same is not the case with an agent. A trustee can dispose of property and confer a valid title on the purchaser provided the latter acts in a *bona fide* manner, pays the price and is ignorant of the fact that the property in question is a trust property. In the case of an agent, if he acts outside his authority, he cannot confer a valid title on a purchaser even if the same is without notice and for valuable consideration.

### Possession

According to Salmond, "In the whole range of legal theory, there is no conception more difficult than that of possession." According to Bentham, "To define possession is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image is different with different men ; if many do not form any image ; or if they form a different one on different

occasions, how shall a definition be found to fix an image so uncertain and variable. Defining the concept of possession in law is like defining the geometric conception of roundness. Absolute roundness cannot be defined and is no where to be found. We may say that a thing is round when it is round enough for practical purposes; in other words, a thing is round when it is so nearly round that one is not conscious that it is not round. Thus, for practical purposes a ping-pong ball is taken as round although it is not absolutely round. Similarly legal possession cannot be defined absolutely and perfectly, but for practical purpose certain conditions and rules of legal possession can be laid down for the guidance of the courts."

### **Its importance**

Possession is one of the most important conceptions in the whole range of legal history. According to Holland, "The ascertainment of the nature of legal possession is, in fact, indispensable in every department of law. It is as essential to the determination of international controversies arising out of the settlement of new countries, or to the conviction of a prisoner for larceny, as it is to the selection of the plaintiff in an action of trover or trespass."

Many important legal consequences flow from the acquisition and loss of possession. Possession is the *prima facie* evidence of the title of ownership. Transfer of possession is one of the chief modes of transferring ownership. The first possession of a thing which as yet belongs to no one, is a good title of right. Possession is so important that a possessor may in many cases confer a good title on another even though he has none himself. If a property is already owned, its wrongful possession is a good title for the wrong-doer as against all the world except the true owner.

### **Definition of Possession**

According to Markby, possession is "the determination to exercise physical control over a thing on one's own behalf coupled with the capacity to do so." This definition is criticised on the ground that it puts emphasis on the animus or the mental element of possession and ignores the corpus or the objective part. The definition applies only to material objects and not to incorporeal objects or rights. Moreover, the capacity to exercise physical control is not absolutely necessary to acquire possession.

According to Justice Holmes, "To gain possession, a man must stand in a certain physical relation to the object and to the rest of the world and must have a certain intent." According to Kant, "There must be the empirical fact of taking possession conjoined with the will to have an external object as one's own." According to Zachariae, "Possession is that relation between a subject-matter and man which intimates that the man has the *animus domini* and that he is also able to put into execution."

According to Salmond, "The possession of a material object is the continuing exercise of a claim to the exclusive use of it." Again, "It is a continuing *de facto* relation between a person and a thing which is known as possession." Possession is a relation of fact and not one of right. It may be, and commonly is, a title of right, but it is not a right itself. Possession is the *de facto* relation between the possessor and the thing possessed. Critics point out that the view of Salmond is not a correct one. According to Holland, a right is "the capacity residing in a person of controlling with the assent and assistance of the state, the action of others." According to Ihering, possession is a legally protected interest and it can control the actions of others with respect to the thing possessed by the force of the state. Possession is a right itself. Possession is not merely the *de facto* relation but also the *de jure* relation between the possessor and the thing possessed. Lawful possession is a right which entitles a person to a declaration of title against those who have no title. A possessor may sue any one who interfered with his possession and is not under any obligation to prove his title. "Possession in law has the advantage of being a root of title. It is a substantive right in the nature of property and may be disposed of *inter vivos* or by will and passes on intestacy."

### **Development of the Conception of possession**

As in the case of ownership, the conception of possession also has grown gradually in the course of many centuries. As civilization began to progress, the people started taking possession of certain objects and thus the idea of ownership began to grow. The struggle for existence was so bitter that individuals began to take possession of certain objects and considered them as their own. They began to take pride in the possession of those things and were not prepared to allow the outsiders to interfere with them. They were determined to exercise continuous control to the exclusion of all others. From a humble beginning, the conception of possession and ownership began to grow and much progress has been made in this connection.

A distinction has to be made between the *jus possessionis* or the right of possession and *jus possidendi* or the right to possess. *Jus possessionis* is the right of the possessor to continue to possess. It is a right to remain in possession except against a person who has a better title. Even a robber has the right of possession and only the true owner can interfere with his possession. If I give something to my servant to be kept in custody on my behalf, he has physical possession of the thing but he has no legal right to it. He has the *jus possessionis* and not *jus possidendi*. This is due to the fact that my servant has merely the *corpus* of possession and not the *animus* or the intention of exercising control over it.

### **Possession in fact and in law**

Possession is divided into two categories, *viz.*, possession in

fact and possession in law. Possession in fact is actual or physical possession. It is a physical relation to a thing. Possession in law means possession in the eye of law. It means a possession which is recognised and protected by law. There is sometimes a discrepancy between possession in fact and possession in law, although usually possession exists both in fact and in law in the same person. A person who is in *de facto* possession of a thing also comes to have *de jure* possession.

However, sometimes possession may exist in fact and not in law. If a servant holds certain things in his custody on behalf of his master, he has the actual possession of those things but in the eye of law, the possession is with the master. In certain cases, possession may exist in law and not in fact. This is so in the case of constructive possession. A tenant may be occupying a particular building but the landlord has the constructive possession of the same. The same is the case with the things in the possession of servants, agents and bailees.

The fundamental element both in possession in fact and in law is the same. That element is the possibility of excluding every person other than the possessor from the use or control of the thing. According to Keeton, "Possession in law and possession in fact are not invariably conterminous, although very frequently they are."

### Elements of Possession

There are two elements of possession and those are the *corpus* of possession and *animus* or the intention to hold possession. The two elements must be present in the case of possession and neither of them alone is sufficient to constitute possession. According to Holland, "A moment's reflection must show that possession in any sense of the term must imply firstly some actual power over the object possessed and secondly some amount of will to avail oneself of that power. Neither the mere wish to catch a bird which is out of my reach nor the mere power which I have without the least notion of exercising it, to seize a horse which I find standing at a shop door, will suffice to put me in possession of the bird or the horse. The Romans by whom this topic was treated with great fullness or subtlety describe these essential elements of possession by the terms *corpus* and *animus* respectively."

### Corpus of Possession

Corpus is the effective realization in fact of the claim of the possessor. Effective realization means that the fact must amount to the actual present exclusion of all alien interference with the thing possessed together with a reasonably sufficient security of the exclusive use of it in the future. The possessor has physical power or physical contact over the thing possessed. The possessor has the absolute power of dealing with the thing in any way he pleases. He has also the absolute power of excluding others



from the possession, private use or enjoyment of the thing concerned. According to Kant, "That a man entirely alone upon the earth could properly neither have nor acquired any external thing as his own; because between him as a person in all external objects as things, there could be no relation of obligation. It is this relation between the possessor and other people whom he can exclude from the thing that furnishes the necessary condition for the foundation of possession." The test of possession is sometimes the appearance of power to exclude others. The exclusion of others may be by means of physical strength, physical barriers, concealment, vigilance, the personal presence of the possessor, custom or the manifestation of the will to hold or *animus domini*. The possessor may use physical force to exclude others. He may lock up his things to maintain his possession. He may conceal his things from others so that they may not run away with them. He may keep a dog or a Chowkidar to protect his possession. The moral sentiment, religion or law may protect the possession of the possessor. The same may be done by the custom of the country or the personal presence of the possessor. According to Pollock, "In common speech a man is said to possess or to be in possession of anything in which he has the apparent control or from the use of which he has the apparent power of excluding others."

It is pointed out that it is not necessary that the possessor must have physical contact with the thing possessed. All that is necessary is that he must have the physical power of dealing with the thing exclusively as his own. To quote Savigny, "The physical power of dealing with the subject immediately and of excluding any foreign agency over it is the factum which must exist in every acquisition of possession. This minimum physical power is not necessary to continue the possession as was required to give rise to it and continuing possession depends rather on the constant power of reproducing the original relationship at will. For this reason, we do not lose possession by mere absence from this subject which we have once appropriated to ourselves, although the physical relation in which we now stand to it would not have sufficed in the first instance to obtain possession." According to Markby, "Corporeal contact is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like and of excluding others. If we consider the various modes in which possession is gained and lost, we shall recognize this very clearly."

I put some money in a box and lock up the same with the key. Although I have no physical contact with the box, the box is in my possession as the key of the box is in my possession. A person has some money in a pocket and some of it is dropped on the road. He continues to be the possessor of the money fallen on the road till the same is picked up by somebody else. When a person gives a dinner, his silver forks while in hands of his guests, are still in his possession. In the case of tamed animals like a

cow, a dog, a horse, a bullock, etc., the owner does not lose his possession even if he loses his physical control over them. A master may be away but he still maintains his possession of his dog or horse. In the case of wild animals like fish, bird and other animals which are *ferae naturae*, if the owner loses physical contact with them, he also loses their possession. They become the property of the person who captures them. In the case of India, if a bull is set free according to the Hindu usage, he is not the property of any individual and no person can be guilty of theft. However, it has been held in certain cases that if a bull is dedicated to an idol and allowed to move about at will, the trustee of the temple is in possession of that bull. The fish in a creek or in an open irrigation tank are not in the possession of the person who has rights of fishery. They become the possession of the person who catches them. However, the fish in a closed tank are in the possession of the owner of the tank.

It is to be observed that the *corpus* of possession is not the same as the physical power to exclude others. A weak person may not have the power to exclude others, but he still has the *corpus* of possession. As a matter of fact, *corpus* depends more on the general expectation that others will not interfere with the control of an individual over a thing than upon the physical capacity of an individual to exclude others.

### **Animus Possidendi**

Animus possidendi or the subjective element in possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. The animus possidendi is the conscious intention of an individual to exclude others from the control of an object. According to Markby, "In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like and to exclude others, but also the determination to exercise that physical power on our own behalf." According to Savigny, "Every case of possession is formed on the state of consciousness of unlimited physical power." According to Holland, "To some possibility of physical control, there must, at any rate for the commencement of possession, be super-added a will to exercise such control." According to Kant, "There must be the empirical fact of taking possession *apprehensio* conjoined with the will to have an external object one's own."

It is to be observed that the *animus sibi habendi* is not necessarily a claim of right. It may be a wrongful claim. A thief has as much real possession of a thing as the true owner. The possessor of a thing is one who intends to act as if he has a right to that thing. The claim of the possessor must be exclusive. The possessor must intend to exclude others from

the use and enjoyment of the thing possessed by him. A mere claim to the use of a thing does not amount to the possession of the material thing itself although it may amount to some form of incorporeal possession. A person who has a right of way over a piece of land does not possess the land but has his right to the use of land for a particular purpose. He is not in possession of the land because he has not the *animus* of exclusion. However, exclusion of others may not be absolute. I have the possession of the land although another person may have the right of way over the same land. The right of way merely puts a restriction on the use of the land by me.

The *animus possidendi* need not amount to a claim or intent to use the thing as owner. A tenant or a borrower or a pledgee is as much in possession of a thing as the true owner himself. The extent and duration of exclusive use may be a short one but that constitutes possession. Moreover, the *animus possidendi* need not be a claim on one's own behalf. Servants, agents and trustees have possession of things although they possess those things on behalf of others.

The *animus possidendi* need not be specific and may be in general terms. A general intention to possess exclusively a class of things is sufficient to confer possession of the separate things in the general category. I have a general possession of all the books in my library even if I do not know the existence of all the books in the library. Likewise, a shopkeeper has the general possession of all the things in his shop. A person who receives a letter comes to have general possession of all that is in the letter. However, if a person buys a certain thing which is believed to be empty and later on something is found in a secret drawer, the purchaser does not acquire possession of the thing found in the drawer.

### Savigny's Theory of Possession

According to Savigny, both the corpus of possession and the *animus possidendi* must be present to constitute possession. As regards the corpus of possession, it is necessary that in every acquisition of possession there must exist in the possessor a physical power of dealing with the subject immediately and of excluding others. When the possession of a thing has been acquired and that possession is intended to be continued, the possessor must have the ability to bring forth physical power to exclude others if they try to interfere with him in any way. However, immediate physical power of the possessor over the thing is not necessary.

As regards the second element, Savigny remarks thus: "*Animus possidendi* must be explained by *animus domini* or *animus sibi habendi*, and he only is to be looked on as in possession who deals as owner with the subject of which he has the deten-

tion. That is to say, he must contemplate dealing with it practically just as an owner is accustomed to do by virtue of his right and consequently not as one recognizing anybody better entitled than himself.

Critics point out that there are *certain shortcomings* in the theory of possession of Savigny. Possession is one conception and there are no separate aspects of it with regard to its acquisition and possession. But it can be pointed out that the acquisition of possession differs from its continuance. Reasonable expectation of non-interference by others is essential for the acquisition of possession and not for its continuance. X snatches away the book of Y. X does not acquire the possession of the book as Y or anybody else may snatch away the same from him. He comes to have possession when there is expectation of non-interference.

Moreover, physical power to exclude others is not essential to the concept of possession. It is not always possible to exclude others. It is not always necessary to exclude others whether in acquiring or retaining possession. This is due to the fact that there are certain objects which cannot be physically possessed. This is particularly so in the case of incorporeal possession. I may have the right of way over the land of another person but this does not mean that I have physical possession of the same. Thus, *the theory of Savigny does not apply to incorporeal possession*. A child or a weak person has not the power to exclude others from possession as the other parties are physically stronger. Moreover, the same thing may be possessed by many persons at the same time. In the case of joint possession, the possession by one party cannot be exclusive.

According to Dias and Hughes, the theory of Savigny as an explanation of Roman law is demonstrably wrong. In the first place, Savigny overlooks the shift in the meaning of the word "possession." He seems to have fallen into the common fallacy that words must necessarily correspond to facts and hence his desire to find factual content for possession. Secondly, he based his statement of this factual content on the utterances of Paul, the jurist. Academic speculation was never the strong point of the Romans and Paul was no exception to it. In the third place, it was erroneous to assume that *corpus* and *animus* which were only conditions sometimes required for the acquisition and loss of possession, constituted possession itself. Fourthly, Savigny's idea of *animus domini*, the intention to hold as owner, fails to explain the cases of the pledgee, Emphyteuta, Sequester and Precario, Tenens, who had possession but did not intend to hold as owners. He first condemned them as anomalous, hinted at "historical reasons" and then suggested that they were cases of "derivative possession" or possession derived from the owner. The view of Savigny that the temporary loss of

one ingredient of possession did not matter, provided there was the ability to reproduce it at will, is also inconsistent with the texts. It does not explain the continued possession of a fugitive slave despite the owner's inability to reproduce the corpus element at all. The only conclusion is that the theory of Savigny completely misrepresents Roman law.

It is not necessary that the possessor must intend to use the thing as owner. It is also not necessary that he should recognize no one as having a better title to the thing than himself. A bailee recognizes the title of the owner but he has still the possession of the thing. The same is the case with the hirer of an article or a pawnee or a pledgee. Thus, Savigny's theory of possession is not accepted in modern times.

It is generally agreed that Ihering was able to demolish the theory of Savigny. He approached the idea of possession as a sociologist. He tried to answer the question as to why Roman law protected possession by means of interdicts. His view was that interdicts were devised to benefit owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to title. Persons who held property would in the majority of cases be owners and possession was attributed to such persons in order to make interdicts available to them. The view of Ihering was that whenever a person looked like an owner in relation to a thing, he had possession of it, unless possession was denied to him by rules of law based on practical convenience. The *animus* element was simply an intelligent awareness of the situation.

Critics point out that the view of Ihering is unduly coloured by the angle of his approach, *i. e.*, the interdicts. The special reasons of policy that lay behind the interdicts require that the person in control should be protected. To that extent the idea of possession for purposes of interdicts had a factual basis. The shift in the meaning of possession occurred outside that sphere and their factual basis ceased to be true. The view of Ihering seems appropriate as an explanation of interdictal possession. But as a general description of possession, it is needlessly narrow. However, it is infinitely superior to the view of Savigny.

### **Methods of Transfer of Possession**

Transfer or acquisition of possession can be done in three ways, *viz.*, by taking, by delivery and by the operation of law.

(1) As regards the acquisition or transfer of possession *by taking*, it is done without the consent of the previous possessor. This also may be done in two ways. One is called the rightful taking of possession and the other the wrongful taking of possession.

A shopkeeper is entitled to get some money from a customer and the shopkeeper takes possession of the things of the customer. This is an example of the rightful taking of possession. If a thief steals something from an individual, his acquisition of possession is wrongful. However, if a person captures a wild animal which does not belong to anybody, the possession is called original.

(2) Another way of acquisition of possession is *by delivery* or *traditio*. In such a case, a thing is acquired with the consent and co-operation of the previous possessor. Delivery is of two kinds, *viz.*, actual and constructive. In the case of actual delivery, immediate possession is given to the transferee. There are two categories of actual delivery. According to one category, the holder retains mediate possession and according to the other the holder does not retain mediate possession. If I lend a book to somebody, I retain the mediate possession of the book but if I sell the same, I do not retain any mediate possession.

*Constructive delivery* is that which is not direct or actual. There are certain things which cannot actually be transferred by the owner to the purchaser or by the transferor to the transferee. In such cases, constructive delivery alone is possible. There are three kinds of constructive delivery and those are *traditio brevi manu*, *constitutum possessorium* and *attornment*. In the case of *traditio brevi manu*, possession is surrendered to one who has already immediate possession. In such a case, it is only the animus that is transferred as the corpus of possession is already with the transferee. I have already lent a book to somebody. If I sell the same book to him, it is a case of *traditio brevi manu*. In the case of *constitutum possessorium*, it is only the mediate possession that is transferred and the immediate possession is retained by the transferor. I may sell my car to somebody but I may retain the physical possession of the same for some time in spite of the payment of price to me. In such a case, the animus is lost and I keep the car on behalf of the purchaser. It is to be observed that in all cases of constructive delivery, there is a change of animus alone and corpus of possession remains where it was before.

(3) Transfer of possession can be made by the *operation of law* as well. This happens when, as a result of law, possession changes hands. If a person dies, the possession of his property is transferred to his successors and legal representatives.

*Res nullius*. According to this principle, the first finder of a thing has a good title to that thing against all but the true owner. It is immaterial if the thing is found on the property of another person. However, there are certain exceptions to this general rule. The rule does not apply if the owner of the property on which the thing is found is in possession of the thing itself and the property. The same is the case if the finder finds the thing

as the servant or agent of another person. The rule also does not apply if the possession of the thing was got through trespass or other wrongful act.

X wounds a hare in the forest and Y catches it on his own field. Y has the better right to the animal. A parcel of bank notes is found by X, a customer, at the floor of the shop of Y. Y had no knowledge of the existence of those bank notes. X acquires a better title to the bank notes as the first possessor than Y. As the shopkeeper was not aware of the existence of the bank notes, he could not be presumed to be in their possession. In another case, a bank note was dropped in the shop of X. The shopkeeper picked up the note and although he knew the owner of that note, he did not return the same and converted it to his own use. He was held guilty of theft. In another case, it was held that the first finder did not become the owner as he was merely an agent. In still another case, it was held that the finder did not become the owner as his action of removing the boat was a trespass.

### **Kinds of Possession**

(1) *Immediate and mediate*—Immediate possession is also called direct possession and mediate possession is also known as indirect possession. If the relation between the possessor and the thing possessed is a direct one, it is a case of immediate possession. When that relation is through the intervention or agency of some other person, it is called mediate possession. If I go to the Bazaar and buy a thing personally, it is a case of immediate possession. If I send an agent to the Bazaar to buy something and he does make the purchase, his possession is mediate and the possession of the agent is mediate. When the agent hands over the thing to me, my possession also becomes immediate.

There are three categories of mediate possession. In the case of the first category, the owner has possession through an agent or servant who acquires and retains possession of a thing entirely on behalf of the owner without claiming any interest for himself. I send my servant to the Bazaar on a bicycle to buy for me a pair of socks. In this case, I have mediate possession of the bicycle and the socks. Likewise, if I deposit certain goods in a warehouse or in a store, the latter holds those goods on my behalf and I retain their mediate possession. In the second case, the immediate possession is with a person who holds the thing on his own behalf and on my behalf and who is bound to hand over the direct possession of the same whenever I desire. This is the case of a hirer, tenant at will or a borrower. They all recognise the superior title of another person. In the case of third category, the immediate possession is with one person but he is bound to return the same after a certain period or on the

fulfilment of certain conditions. If I owe some money to somebody and pledge certain things to my creditor, the pledgee has immediate possession of the thing pledged but is bound to return the same to the pledgor on the payment of the debt.

The threefold classification of mediate possession has been criticised by certain writers. It is pointed out that in the case of an agent or servant, he does not possess the thing but has merely the custody of the thing. The *animus possidendi* is lacking. Even if a thing is given to a servant for sale, he merely acquires the custody of the thing in possession. The reason is that if he had immediate possession of the thing, he could not be held guilty of theft in case of misappropriation. It is also pointed out that it is the bailee and not the bailor who can sue for interference with the possession of the bailee. It is the bailee who has the possession and not the bailor. In the case of a bailee at will, both the bailor and the bailee have possession of the thing and both of them can sue for interference with their possession.

It is also pointed out that two persons cannot be in possession of the same thing at the same time adversely to each other. The reason is that if one person has both the corpus of possession and the *animus possidendi*, he has full possession of the thing and no other person can have possession to the same thing. The case is different in the case of co-owners. They are joint owners and neither of the two has any right to exclude the other. In the case of bailment at will, the bailor and bailee are both in possession of the same thing at the same time.

(2) *Corporeal and Incorporeal Possession*—The corporeal possession is the possession of a material object and incorporeal possession is the possession of anything other than a material object. I have corporeal possession of my car and books, but I have incorporeal possession of a trade-mark, a patent and a copyright. Corporeal possession is the possession of a thing and incorporeal possession is the possession of a right. According to the Italian Civil Code, "Possession is the detention of a thing or the enjoyment of a right by any person either personally or through another who retains the thing or exercises the right in his name." According to Burns, "Just as corporeal possession consists not in actual dealing with the thing but only in the power of dealing with it at will, so incorporeal possession consists not in the actual exercise of a right but in the power of exercising it at will; and it is only because the existence of this power does not become visible as an objective fact until actual exercise of the right has taken place that such actual exercise is recognised as an essential condition of the commencement of possession."



(3) *Representative Possession*—Representative possession is that in which the owner has possession of a thing through an agent or a servant. The real possession is that of the actual owner and not that of the representative. I put some money in the pocket of my servant to buy certain things from the Bazar. Money in the pocket of the servant is not in his possession. It is a case of representative possession. The essence of representative possession lies in the fact that the master has the animus to exercise control over the thing in the hands of his servant or agent.

(4) *Concurrent Possession*—In the case of concurrent possession, the possession of a thing may be in the hands of two or more persons at the same time. Claims which are not adverse and which are not mutually destructive, admit of concurrent realisation. In the case of concurrent possession, mediate and immediate possession may exist in respect of the same thing. The possession of my servant over a thing of mine may be immediate but my mediate possession is also there. Two or more persons may possess the same thing jointly. Corporeal or incorporeal possession may exist with regard to the same material thing. I may possess a piece of land and another person may have the right of way on the same land.

(5) *Derivative Possession*—In the case of derivative possession, the holder of the thing combines in himself both the physical and mental elements which constitute legal possession. A creditor has a derivative possession of the thing pledged to him. Likewise, a watch-maker has a derivative possession of a watch entrusted to him for repairs so long as the repair charges are not paid. A bailee has a derivative possession of the goods bailed to him. In these cases, the title of the holder of the thing is derived from the person who entrusts the thing. It is pointed out that if the owner of the watch takes away the watch forcibly without making the payment, he is guilty of theft.

(6) *Constructive Possession*—Constructive possession is not actual possession. It is a possession in law and not possession in fact. The goods sold by me are lying in a warehouse and if I hand over the keys of the warehouse to the purchaser, the latter comes to have the constructive possession of the thing. If I hand over the key of a building to a tenant, I give the constructive possession of the building to the tenant. The handing over of the key shows that possession has changed in law although not in fact.

### **Why is possession protected ?**

Possession is protected by law and this is so not only in the case of a rightful holder but also of a person who has taken possession of a thing wrongfully.

Many reasons have been given by various writers for the protection of possession.

(1) According to Justice Holmes, law is founded on facts and it must protect possession which exists in fact. To quote him, "It is enough for the law that man by an instinct will not allow himself to be dispossessed either by force or by fraud of what he holds without trying to get it back again."

(2) According to Kant, men are born free and equal. Freedom of will is the essence of man and it must be recognized, respected, protected and realised by all governments. Possession is the embodiment of the will of a man. By taking possession of a thing, a person incorporates his will and personality in that thing. Possession is the objective realization of free will. The will of a person as expressed in possession must be protected.

According to Puchta, "The will which wills itself, that is, the recognition of its own personality, is to be protected." According to Gans, "The will is of itself a substantial thing to be protected and this individual will has only to yield to the higher common will."

(3) According to Savigny, possession is protected in the same way as the body of a person is protected. As an act of violence to a person is unlawful, likewise, an act which disturbs possession by fraud or force is also unlawful. If possession is protected, it leads to better order and if it is not protected, it leads to acts of violence and that is hardly in the interests of the growth of society.

(4) According to Holland, "The predominant motive was probably a regard for the preservation of the peace." According to Windschild, protection to possession is given in the same way as protection is given against *injuria* or the violation of a legal private right.

(5) According to Ihering, possession is ownership on the defensive. The possessor must be protected and he must not be asked to prove his title against a person who is in an unlawful possession. Most of the possessors are the rightful owners and it is desirable that they should be protected. Possession is the evidence of ownership. Possession is patent to all. Possession is the nine points of law and hence protection should be given to possession.

### **Possessory Remedies**

According to the English law, possession is a good title of right against any one who cannot show a better title. Even a wrongful possessor has the rights of an owner with respect to all persons except earlier possessors and the true owner himself. In other legal systems also, possession is considered to be a provisional title even against the true owner. Even if a person is deprived of a thing wrongfully, he cannot take possession of the same forcibly. He

has to seek the help of the machinery of law to recover possession of his own thing. According to Salmond, legal remedies for the protection of possession are called possessory remedies. Likewise, proprietary remedies are those which protect ownership.

There are many reasons why possession is protected. In the first place, the evils of violent self-help are very serious and in all civilized countries, those are prohibited. Experience shows that there can be better conditions in society if the use of force is avoided by the real owners. Lawful methods are always to be preferred and no one should take the law into his own hands.

To begin with, the proprietary remedies were very imperfect. Those were cumbersome, dilatory and inefficient. Every claimant had to undergo many hardships. The position of the plaintiff was a very difficult one and no person was to be allowed to occupy the advantageous position of the defendant. It was under these circumstances that it was provided that the original state of affairs must be restored first. Possession must be given to him who had it first and then alone the claims of the various persons should be discussed. This was so in the past but the same argument does not hold good in modern times on account of the improvement of the law of procedure. The position of the plaintiff is not so bad as it was in the past. Both the plaintiff and the defendant are required to prove their own points of view.

(2) Another justification for possessory remedies lies in the difficulty of the proof of ownership. It is easier to prove possession of a thing than to prove its ownership. No person can be allowed to take advantage of his wrongful act by depriving another person wrongfully of his property and then asking him to prove his title to the same. He who takes a thing forcibly must restore it to him from whom he has taken it. It is only then that he should be asked to prove his title to the same.

Possessory remedies have been rejected by English law and other provisions have been made to protect possession. It is laid down that the plaintiff must prove that he has a better title to the thing than the defendant who is actually in possession of a thing in dispute. Prior possession is a *prima facie* proof of title but the presumption can be rebutted by the defendant by proving that he has a better title to the thing itself. A defendant is not allowed to set up the defence of *jus tertii*. He is not allowed to maintain that neither the plaintiff nor he himself but some other third person is the true owner. It is the duty of every individual to defend his own title and he cannot be allowed to drag in irrelevant matters.

In the case of India, Section 9 of the Specific Relief Act and Section 145 of the Code of Criminal Procedure protect possession. Possession is given back to those persons who are actually the possessors during the last six or two months.

### Possession and Law

It is very often said that possession is nine points of the law. This means that possession confers upon the possessor the several requirements for success in a litigation. A person in possession enjoys certain advantages over a person who is not in possession, and this can be shown by referring to the various branches of law.

As regards the law of property, possession of property is one of the methods of acquiring ownership. If there is no owner of a thing, the person who takes possession of it becomes its owner. Even in the case of a thing which has an owner, a trespasser may take possession of it and if he keeps that possession for the statutory period of 12 years, he comes to acquire title to that property. His possession ripens into ownership. The period is 60 years if the property belongs to the state. It is obvious that possession puts a person in a very advantageous position.

As regards the law of evidence, possession of a thing gives rise to a presumption of ownership. A person who is not in possession has to prove his title against the person who is in possession of a thing. The burden to prove is obviously on the person who is not in possession and to begin with the law is on the side of the person who is in possession.

The law of procedure recognises certain remedies known as possessory remedies. Protection is given by law to the person who is in possession. If a person in possession is dispossessed, he can recover possession by filing a suit under Section 9 of the Specific Relief Act. While deciding the case, the only consideration before the court is whether the plaintiff was in possession of the property before he was dispossessed or not. The question of title is not considered at all. The same applies to proceedings under Section 145 of Code of Criminal Procedure. If a person is dispossessed, he can apply to the magistrate concerned, and if he proves his possession before dispossession the law requires that he must be restored his possession. The justification that is put forward is that there will be lawlessness in society if the people are allowed to take the law into their hands and turn out forcibly those who are already in possession.

Criminal Law also protects possession by making it an offence to remove property which is in the possession of another person. This applies to the offence of theft which is given the name of larceny in England. In the case of *Merry v. Green*, a person purchased a bureau at an auction. On search, the purchaser found that there was a secret drawer in the bureau, and when he opened it he found that there was some money in it. The money found in the drawer belonged to the vendor because he had sold not the money but only the bureau. It was held that in the eye of law, the vendor still continued to be in possession of the money in the secret drawer. Consequently, it was held that the purchaser had committed the offence of larceny.

### Possession and Ownership

According to Ihering, "Possession is the objective realization of ownership." According to Salmond, possession "is in fact what ownership is in right. Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one. A thing is owned by me when any claim to it is maintained by the will of the state as expressed in the law; it is possessed by me when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts." Again, "Possession, therefore, is the *de facto* counterpart of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong, or the special nature of the claims in question. Possession without ownership is the body of fact, uniformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things tend mutually to coincide. Ownership strives to realise itself in possession, and possession endeavours to justify itself as ownership. The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies."

It is pointed out that ownership and possession have the same subject-matter. Whatever can be owned can be possessed and whatever can be possessed can also be owned. However, there are certain claims which can be realised and exercised in fact without receiving any recognition or protection from law. There is no right vested either in the claimant or in any one else. There is possession without ownership. Men might possess copyrights, trade-marks and other forms of monopoly although law may refuse to defend the same. It is also pointed out that there are many rights which can be owned but not possessed. Those are transitory rights which do not admit of continuing exercise and possession. They cannot be possessed as they are destroyed after their fulfilment. A creditor does not possess a debt as it is a transitory right. However, a person can possess an easement over a piece of land as its continued existence is possible.

On the whole, a right *in rem* can both be owned and possessed but a right *in personam* can be owned but it cannot be possessed.

### Suggested Readings

- |                 |   |
|-----------------|---|
| Friedmann       | : Law and Social Change.                      |
| Goodhart, A. L. | : Essays in Jurisprudence and the Common Law. |

Holmes	: The Common Law.
Kocourek	: Jural Relations.
Paton	: Jurisprudence.
Pollock	: A First Book of Jurisprudence.
Pollock and Maitland	: History of English Law.
Pollock and Wright	: Possession in the Common Law.
Salmond	: Jurisprudence.
Savigny	: Possession.

## CHAPTER XV

### PERSONS

#### Definition of Person

The word person is derived from the Latin word '*persona*.' This term has a long history. To begin with, it simply meant a mask. Later on, it was used to denote the part played by a man in life. After that, it was used in the sense of the man who played the part. In later Roman law, the term became synonymous with *caput*. A slave had an imperfect *persona*. Last of all, the term is used in the sense of a being who is capable of sustaining rights and duties.

Many definitions of persons have been given by various writers. According to Gray, a person is "an entity to which rights and duties may be attributed." According to Salmond, "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not and no being that is not so capable is a person even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance and this is the exclusive point of view from which personality receives legal recognition." Again, a person is "any being whom the law attributes a capability of interests and therefore of rights, of acts and therefore of duties."

According to Paton, a legal personality is a particular device by which law creates units to which it ascribes certain powers. It is merely a convenient juristic device by which the problem of organising rights and duties is carried out.

According to the German writers, "Will is the essence of a personality. A legal person is one who is capable of will." According to Zitelmann, "Personality is the legal capacity of will. The bodiliness of men is for their personality a wholly irrelevant attribute." According to Meurer, "The juristic conception of the juristic person exhausts itself in the will and the so-called physical persons are for the law only juristic persons with a physical *super fluum*."

According to Karlowa, "The body is not merely the house in which the human personality dwells ; it is, together with the soul which now for this life is inseparably bound with it, the personality. So, not only as a being which has the possibility of willing, but as a being which can have manifold bodily and spiritual needs and interests as a human centre of interest, is a man, a person."

According to the English and American jurists, a person must have not only a corpus but also an animus. Mere animus or will is not enough. A person is one who has rights and duties. It is something which can own rights and is also capable of doing acts which affect the rights of others.

A person is not necessarily a human-being. There may be human-beings who are not persons. Slaves are not persons in the legal sense as they cannot have rights. In the same way, there may be persons who are not human-beings. This is particularly so in the case of corporations. According to the Hindu law, idols are legal persons. Although they have a personality in the eye of law, they are not human-beings. The term personality has a wider significance than humanity.

In the philosophical sense, personality is the basis of a human-being. In the legal sense, it is the capacity of being a "right and duty-bearing unit." Legal personality is a device by which law creates units to which it attributes certain legal rights and duties. Legal personality is an artificial creation of law.

### **Kind of persons**

Two kinds of persons are recognised by law and those are *natural persons* and *legal persons*. Legal persons are also known as artificial, juristic or fictitious persons.

(1) According to Holland, a *natural person* is "such a human-being as is regarded by the law as capable of rights and duties—in the language of Roman law, as having a status." According to another writer, natural persons are "living human-beings recognised as persons by the state." The first requisite of a normal human-being is that he must be recognised as possessing a sufficient status to enable him to possess rights and duties. A slave in Roman law did not possess a personality sufficient to sustain legal rights and duties. In spite of that, he existed in law because he could make contracts which under certain circumstances were binding on his master. Certain natural rights possessed by him could have legal consequences if he was manumitted. Likewise, in Roman law, an exile or a captive imprisoned by the enemy forfeited his rights. However, if he was pardoned or freed, his personality returned to him. In the case of English law, if a person became an outlaw, he lost his personality and thereby became incapable of having rights and duties. The second requisite of a normal human-being is that he must be born alive. Moreover, he must possess essentially human characteristics.

(2) *Legal persons* are real or imaginary beings to whom personality is attributed by law by way of *fiction* where none exists in fact. Juristic persons are also defined as those things, mass of property, group of human-beings or an institution upon whom the law has conferred a legal status and who are in the eye of law capable of having rights and duties as natural persons.



Law attributes by legal fiction a personality of some real thing. A fictitious thing is that which does not exist in fact but which is deemed to exist in the eye of law. There are two essentials of a legal person and those are the corpus and the animus. The corpus is the body into which the law infuses the animus, will or intention of a fictitious personality. The animus is the personality or the will of the person. There is a *double fiction* in a juristic person. By one fiction, the juristic person is created or made an entity. By the second fiction, it is clothed with the will of a living being. Juristic persons come into existence when there is in existence a thing, a mass of property, an institution or a group of persons and the law attributes to them the character of a person. This may be done as a result of an act of the sovereign or by a general rule prescribed by the government.

A legal person has a real existence but its personality is fictitious. Personification is essential for all legal personality but personification does not create personality. Personification is a mere metaphor. It is used merely because it simplifies thought and expression. A firm, a jury, a bench of judges or a public meeting is not recognised as having a legal personality. The animus is lacking in their case.

### **Animals are not Persons**

According to some writers, animals are persons. They point out that "law prohibits cruelty towards them and English law enforces trusts of property in their favour, the obligations which the law enforces in these respects seem to correlate with rights vested in the animals." According to Keeton, "In Greek law, we hear of animals and trees being tried for offences to human-beings, and obviously, therefore, they are considered capable of having duties, even if they possessed no rights. Even in the middle ages, trials of animals continued. In Germany, a cock was solemnly placed in the prisoner's box and was accused of contumacious crowing. Counsel for the defendant failed to establish the innocence of his feathered client, and the unfortunate bird was accordingly ordered to be destroyed. In 1508, the caterpillars of Contes, in Provence, were tried and condemned for ravaging the fields, and in 1545 the beetles of St. Julien de-Maurienne were similarly indicted. So late as 1688, Gaspard Bailly of Chamberg in Savoy was able to publish a volume including forms of indictment and pleading in animal trials. In all these cases, the animal is considered to be capable of sustaining duties and is therefore to this extent a legal person. The same idea is reflected in Jewish law where it is provided that the ox that gores must not be eaten."

The present view is that animals are not persons. The animals do not possess any rights and it is only on account of humanitarian considerations that kindness is shown to them. If that were not so, the duty of refraining from defacing ancient monuments

protected by law would correspond to rights vested in the monuments and they will be persons. Obviously, such a proposition is simply ridiculous.

### **Legal Status of Dead Persons**

There are certain writers who hold the view that dead human-beings are also persons. According to them, "A living human-being concerns himself much with what shall become of his dead body, and his reputation and estate after he is dead. He may, when alive, give binding directions as to these—body, reputation and estate—and the law does in some degree recognise and take account of his desires and interests."

Critics point out that dead human-beings are not legal persons. They are immune from duties and no sanction can be enforced against them. They are not the subjects of rights. As soon as they die, they lose their legal personality and thus become devoid of legal rights and duties. Moreover, a dead person cannot enforce compliance with his directions regarding the disposal of his dead body, reputation and estate. At the most, compliance with those directions can be enforced by his relatives. Consequently, the rights vest in the relatives of the dead person and not in the dead person himself.

In spite of this, law does take into consideration the desires and interests of the dead person even after his death. A corpus is not property and cannot be disposed of by will. However, every dead person has a right to decent burial. Desecration of graves is an offence in India. No indignities can be offered to human remains by improperly and indecently disinterring them.

Law also protects the reputation of dead persons from libellous attacks. According to the Indian Penal Code, it is defamation to impute anything to a deceased person if the same would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or other near relatives. It is clear that law does not protect the dead person from libellous attacks but merely protects his successors who are liable to suffer as a result of attacks on the dead person.

Before his death, a person can leave directions with regard to the disposition and enjoyment of his property after his death. This he can do by means of a will. However, it is pointed out that the object of the will is merely to protect the interests of the successors of the dead person. The dead person has no rights in his property and it is only his legal successors who have any rights in them.

### **Status of Unborn Persons**

Unlike dead persons, unborn persons have a legal personality. They are entitled to own property even before their birth,

although their ownership is a contingent one. If they are not born alive, ownership may not be complete. A person is allowed by law to transfer his property by will to an unborn person. A child in the womb of the mother is regarded as already in existence for many purposes. According to Coke, "The law in many cases hath consideration of him in respect of the apparent expectation of his birth."

It is to be observed that a posthumous child can also inherit. However, if the child dies in the womb of the mother or is still-born, there is no effect on inheritance and no person can claim through him. The Hindu law provides that if a son is in the womb of the mother at the time of partition, he can reopen the question of partition on his birth and get an equal share along with his other brothers. If a child is born alive but dies soon after on account of the injury to the womb, the person causing such injury is guilty of murder. However, if a child is killed in the womb itself, the offence of murder is not committed. The personality of the unborn child is contingent on his being born alive. Damages can be claimed for injury to the foetus of a woman if she is known to be pregnant. A posthumous child can claim compensation for the death of his father in a fatal accident. A woman convict cannot be executed if she is pregnant. She can be executed after delivery. If a child is born alive, but dies soon after, the course of succession is affected. However, that is not the case if he is not born alive.

The creation of proprietary rights in favour of unborn persons is governed by the *rule against perpetuity*. According to that rule, one cannot postpone the vesting of an estate beyond a period longer than the life-time of the transferee or transferees existing at the date of the transfer and the minority of the ultimate unborn beneficiary.

### **Kinds of Legal Persons**

There are three kinds of legal persons, *viz.*, *corporations*, *institutions* and *fund or estate*. (1) A *corporation* is an artificial or fictitious person constituted by the personification of a group or a series of individuals. The individuals forming the corpus of the corporation are called its members. A corporation is either a corporation aggregate or a corporation sole.

Three conditions are necessary for the existence of a corporation. There must be a group or body of human-beings associated for certain purposes. There must be organs through which the body or the group acts. A will is attributed to a corporation by a legal fiction. The corporation is distinguished from the individuals who constitute the corporation. A corporation has a personality of its own which is different from the personalities of the individuals. A corporation can sue and be sued. Even if the members of a corporation die, the corporation

continues. A corporation is recognized by law as a permanent and continuous legal entity. It is not affected by the deaths of its members. A corporation can enter into contracts with its members as it has a personality distinct from that of the members. A corporation can have property and rights and duties. Unlike natural persons, a corporation can act only through its agents. It does not die in the way natural persons die. Law provides special procedure for the winding up of a corporation.

(2) In some cases, the corpus or the object personified is not a group or succession of individuals but an *institution* itself. Examples of institutions are a college, church, library, mosque, hospital, an idol, etc.

(3) In some cases, the corpus or the object personified is some *fund* or *estate* reserved for a particular purpose. Examples of this kind of legal persons are the property of a dead man, the estate of an insolvent, a fund for charity, an estate under a trust, etc. According to Roman law, the estate of a dead person was regarded as having a legal personality by the notion of *hereditas jecens* till it was vested in the legal heirs. Likewise, the *Stiftung*, an unincorporated fund for charitable purposes, was vested with rights and duties and was itself personified.

### **Kinds of Corporations : Corporation Aggregate**

Corporations are of two kinds, corporation aggregate and corporation sole. According to Halsbury's Laws of England, "A corporation aggregate is a collection of individuals united into one body, under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual, liberty of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common, and of expressing a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence." A corporation aggregate is an incorporated group or body of co-existing persons united for the purpose of advancing certain ends or interests. The number of corporations aggregate is very large and they are of various kinds. Their importance is also very great in the field of law. Thus, we have a very large number of limited companies having millions of share-holders spread in different parts of the world. It is to be observed that a limited company is something different from its share-holders. It has a personality of its own which is different from its share-holders. The property of the company is not the property of the share-holders. The assets and liabilities of the company are different from those of its members. A company can contract with its share-holders. It

is liable for torts. Even if the number of share-holders is reduced to one, the share-holder and the company are two distinct persons.

According to Dias and Hughes, the main purpose of the corporation sole is to ensure continuity. It avoids an abeyance in seisin. Moreover, the occupant of the office can acquire property for the benefit of his successors. He may contract to bind or benefit them. He can sue for injuries to the property while it is in the hands of his predecessor.

### **Corporation Sole**

Corporation sole is an incorporated series of successive persons. It is a corporation which has one member at a time. It is a body politic having a perpetual succession. It is constituted in a single person who, in right of some office or function, has the capacity to take, purchase, hold and demise land and hereditaments. A corporation sole is perpetual but there may be and mostly are periods in the duration of a corporation sole, occurring irregularly, in which there is a vacancy or no one in existence in whom the corporation resides and is visibly represented. Examples of corporations sole are the offices of the Postmaster-General, the Minister of Health, the Minister of Agriculture, the Public Trustees, Secretary of State for War, the Solicitor to the Treasury, the Comptroller and Auditor-General of India, the President of the Republic of India, etc. A corporation sole does not require a seal but a corporation aggregate can act or express its will only by a deed under the common seal. The existence of a common seal is the evidence of incorporation and the non-existence of a common will is an evidence against incorporation. A corporation can change its seal at will.

A corporation sole is an example of *dual personality*. If a single human-being has in one capacity, legal relations with himself in another capacity, there arises a case of dual personality. The King of England exercises the function of the Crown and in his capacity as the constitutional head, he can confer rights and duties on himself as an individual. The natural person may owe a duty to the legal person. He may have rights against the legal person. The same is the case with the President of India. The trustee as an individual may owe money to or enter into contracts with himself in his capacity as a trustee.

According to Dias and Hughes, "A question that is also asked is whether a corporation can survive the last of its members. Professor Gover mentions a case in which all the members of a company were killed by a bomb while at a general meeting, but the company was deemed to survive." (P. 290, Jurisprudence).

### **Essential Features of a Corporation**

Reference may be made to the essential features of a corporation. A corporation has in law a different existence and personality

from that of its members or share-holders. Its personality is fictitious. The incorporation of a firm brings about a fundamental change in its legal position. It comes to be invested with a personality of its own.

The distinction between a corporation and its members is fundamental. The property of a corporation is not considered to be the property of the share-holders. No share-holder can claim that a particular part of the property of a corporation belongs to him. Likewise, a corporation cannot lay any claim to the property of its share-holders. The share-holders of a corporation may be perfectly solvent but the corporation may become insolvent. As a corporation has a separate personality and existence of its own, there is no difficulty in a member entering into a contract with the corporation.

A corporation can survive the last of its members. It does not die with the death of its share-holders. The law of a country lays down the conditions according to which a corporation can be brought into existence and also ended. The successor of a share-holder does not become a share-holder. He has to get himself registered as such. If he does not do so, he does not automatically become a share-holder. It is possible that one share-holder may purchase all the shares of the rest of the share-holders. In this way, he can become the sole share-holder. In case he dies and his successor or successors do not register themselves as share-holders, the company continues to exist even without a share-holder.

### **Corporation and Firm**

It is interesting to point out the difference between a corporation and a firm. A corporation has an existence and a personality of its own which is different from that of its members or share-holders. That is not the case with a firm. A firm is not considered to be a legal person. As a corporation has a separate personality of its own different from that of its members, it is possible for a corporation to enter into a contract with its members. However, that is not the case with a firm. No firm can enter into a contract with its members. A corporation can possess property and have rights and duties different from that of its members. Such a thing is not possible in the case of a firm. The property of the firm is the property of the members. A corporation can exist even with one member. It can even survive a sole member. This is not possible in the case of a partnership firm. There must be more than one member of a partnership firm. Moreover, a partnership firm comes to an end with the death of the partners. A corporation has a permanent existence.

### **Corporation and Natural Persons**

There is also a fundamental distinction between a corporation and natural persons. A natural person is born as a result

of the working of law of nature and also dies in the same way. However, when a corporation has to be created, an application has to be made to some office set up for that purpose by law. In the case of a joint stock company, the application is made to the Registrar of Joint Stock Companies. A corporation can also be created by means of a Royal Charter or an Act of Parliament. This was done in the case of the English East India Company. In the same way, municipal corporations can be set up. A corporation also comes into existence by prescription. The same is the case with regard to the dissolution of corporations. A corporation can be declared defunct when it stops doing its business. Its charter can be forfeited. It can voluntarily surrender its charter or the privileges granted to it.

A natural person can act himself. It is not binding on a natural person to get his work done through others. However, in the case of a corporation, it is absolutely essential that it must act through its agents. Moreover, a natural person can do whatever he pleases. There is no restriction on what he can do and what he cannot do. However, in the case of a corporation, its powers are defined in the instrument when the corporation is created. A limited company cannot go beyond the terms of its memorandum of association. Even if all the share-holders of a company agree, they cannot do a thing which is beyond the terms of the memorandum of association. However, the memorandum of association itself can be changed.

### **Theories of corporate personality**

There are many theories with regard to the nature of corporate personality and those are the fiction theory, the realistic theory, the concession theory and the bracket theory.

#### **(1) Fiction theory**

The fiction theory was pronounced by Savigny. According to him, a personality is attached to corporations, institutions, and funds by a pure legal fiction. The personality of a corporation is different from that of its members. There is a double fiction in the case of a corporation. By one fiction, the corporation is given a legal entity. By the second fiction, the corporation is clothed with the will of an individual person. The fictitious personality of the corporation comes to have a will of its own which is different from that of its members. The view of Savigny was that a corporation was exclusively a product of law.

According to Salmond, a corporation has a reality or existence but it has no real personality. As it has no real will of its own, a corporation must have a fictitious will.

According to Pollock, the English common law was opposed to the fiction theory. However, it cannot be denied that the fiction theory was widely applied in England. An ordinary club or an association has no real personality in law. However, a club is incorporated and is given a personality by law. This is merely a fiction.

## **(2) Realistic theory**

This theory was propounded by Gierke, the great German jurist. He has been followed by Maitland, Pollock, Jethrow Brown, etc. According to Gierke, every group has a real mind, a real will and a real power of action. A corporation has a real existence independent of the fact whether it is recognised by the state or not. The corporate will of the corporation expresses itself through the acts of its servants and agents. The existence of a group person goes beyond the aggregate of the individualities of persons forming the group. There is no legal fiction about the personality of a group person. It is independent of its recognition by the state. According to this theory, every group comes to have a personality of its own whether that group is a social one or a political one.

It is pointed out that a group or an association of persons has a will of its own which is different from the individual wills of the members. The wills of the members react on one another to produce a new and distinct will and that will is possessed by the group person.

## **(3) Concession theory**

According to this theory, the only realities are the sovereign and the individuals. The other groups cannot claim recognition as persons. They are treated as persons merely by a concession on the part of the sovereign. Legal personality is conferred only by law.

## **(4) Bracket theory**

According to this theory, the members of a corporation are the bearers of the rights and duties which are given to the corporation for the sake of convenience. It is not always practicable or convenient to refer to all the innumerable members of a corporation. A bracket is placed around them to which a name is given. That bracket is the corporation.

Salmond criticizes the theory of group-person on two grounds. It is not applicable to a corporation sole as we cannot have any group mind or group personality. Moreover, a corporation aggregate can exist even if there is only one surviving member or there is no member at all. Under the circumstances, it is not possible to talk of a group. Collective will is



considered to be a fiction and it is pointed out that to replace the fiction theory by realistic theory is to drive out one fiction by another fiction.

According to Keeton, if corporations exist independently of state recognition, there must be a number of corporate personalities which have not yet received state recognition. The state may concede legal personality to associations or groups which have no true corporate existence but which are united simply to achieve together limited ends.

According to Gray, "Whether the corporation is a fictitious entity or whether, according to Gierke's theory, it has a real entity with a real will, seems to be a matter of no practical importance or interest. On each theory the duties imposed by the state are the same and the persons on whose actual wills those duties are enforced are the same."

According to Kelsen, legal personality is itself nothing but a fiction. Legal order can attribute legal personality at will. If it wishes to do so, it can personify things, institutions or groups. "Juristic and physical persons are essentially on the same plane. The physical person is the personification of the sum-total of legal rules applicable to one person. The juristic person is the personification of the sum-total of legal rules applicable to a plurality of persons."

According to Prof. Friedmann, "In its pure form the fiction theory is politically neutral. Its offspring, the concession theory, is, however, an eminently political theory; its principal purpose has been to strengthen the power of the state to deal as it pleases with group associations inside the state. The state alone, though itself a juristic personality, is placed on the same level as the individual. Its personality is really beyond question, and it bestows on or withdraws legal personality from other groups and associations within its jurisdiction as an attribute of its sovereignty. It is not surprising that the theory was found handy, for example, to justify the confiscation of Church property in the French Revolution and that it underlies the claim of any political dictatorship to prohibit freedom of association. The concession theory is, in fact, the necessary concomitant of any theory of unfettered state sovereignty." (P. 513, *Legal Theory*).

According to the same writer, "While each of these theories contains elements of truth, none can, by itself, adequately interpret the phenomenon of juristic personality. The reason is that corporate personality is a technical legal device, applied for a multitude of very diverse aggregations, institutions and transactions which have no common political or social denominator, whereas each of the many theories has been conceived for a particular type of juristic personality. None of them foresaw the extent to which the device of incorporation would be used in modern business."

Dias and Hughes have made certain observations about the theories of corporate personality. Their view is that no single theory takes into account all the aspects of the problem of personality. We should at all times keep clear in our minds two questions. The first question is, what does any given theory set out to explain? The second question is, what do we ourselves want a theory to explain? The theories that have been considered are philosophical, political or analytical. We must remember that the law has been dealt upon empirically, and on a functional basis. English law has not committed itself to any theory. There is undoubtedly a good deal of theoretical speculation, but it is not easy to say how much of it affects even single decisions. Authority can be found in the same case to support different theories.

Two linguistic fallacies appear to lie at the root of too much of theorising. The first is that similarity of language form has masked dissimilarities in the ideas behind it. We speak of corporations in the same language that we use for human-beings. However, the ideas which the language expresses differ in the two cases. The other fallacy is the persistent belief that words stand for things, whereas they only represent ideas. That has led to a lot of confusion. A glance at the development of the word '*persona*' shows progressive shifts in the ideas represented by it. It meant originally a mask, then the character indicated by a mask, the character in a play, some one who represents the character, a representative in general, a representative of the church, a Parson. It is not easy to trace precisely how the word '*persona*' acquired its technical meaning of an entity with rights, etc. It is true that the law can only take account of the human-beings in this way which in Roman law meant to bear, to sue as well as own property. The development of these capacities in bodies such as the municipium, collegium, etc., may have helped to abstract the idea. However, it would be wrong to suppose that the word '*persona*' was used technically in this sense. There was only a tendency in that direction in late law. Some such idea of *persona* seems to have been present in the mind of Tertullian who brought his legal ideas to bear on the interpretation of the "person" of Christ. He gave the word another shift in meaning as the possessing of the "properties" of divinity and humanity. In English law, the extension of the term from human-beings to corporations and the like represents another shift.

### **Nationality of Corporation**

As a corporation has no physical existence, the question of its nationality and domicile is a difficult one. Broadly speaking, a corporation incorporated in accordance with the requirements of Indian law is an Indian corporation and a corporation incorporated according to foreign law is a foreign corporation. The latter is recognized as a legal person by Indian law and as such

can sue and be sued in Indian courts. In normal times, the question of nationality may be taken to be conclusively settled by the place of incorporation but difficult problems arise in times of war. The courts are called upon to decide as to whether a particular corporation is an enemy corporation or a friendly one. On this decision depends the fate of the assets of a corporation.

The general principle with regard to the domicile of the corporation is that it is domiciled where its office or head office is registered provided it carries its business there. In the case of *Daimler* (1916), it was held that even if a corporation is registered in England and carries on business in England, it has an enemy domicile if all its share-holders are enemy aliens. It is possible for a corporation to have more than one domicile. In the case of *Swedish Central Co. v. Thompson*, it was held that a corporation may have one domicile where its registered office is situated and another domicile where the controlling influence in the corporation is situated.

### Liabilities of a Corporation

A corporation is not a natural person and has to act through its agents. The law provides that a corporation owes both civil and criminal liability for the acts done by its agents within the scope of their employment.

As regards *civil liability*, a corporation is liable for the tortious acts of its servants or agents if the act was done within the scope and course of employment and the act was within the powers of corporation. This is so if the act would be a tort if done by a natural person. This is the rule of *vicarious liability*. The old view was that as a corporation had no mind of its own, it could not be held responsible for torts. However, that view has been given up in modern times.

In the sphere of contracts, it has been held that generally a corporation contracts under a seal and the presence of the seal is an evidence of the assent of the corporation. However, there are certain exceptions to the general rule. It has also been held that the relation of the corporation to its agents falls within the ordinary law of master and servant and consequently an agent is bound to act within the scope of his authority if he wishes the act to bind the corporation. The capacity of a corporation to act may be limited by the terms of its charter or by the statute creating it. In these cases, any attempt to perform an act beyond those powers would be *ultra vires* so far as the corporation is concerned and consequently would have no legal effect.

In the case of *Abrath v. North Eastern Railway Company*<sup>1</sup>, the railway company prosecuted Dr. Abrath, a surgeon, on the

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1. (1886) 11 A. C. 247.

ground that he had given a false certificate to a passenger who was alleged to have received injuries in a railway accident. However, the surgeon was acquitted. After that the surgeon filed a suit against the railway company for damages for the tort of malicious prosecution. It had to be proved by the plaintiff in that case that the malicious prosecution was made with an improper motive. However, it was held by Dr. Bramwell that "a corporation is incapable of malice or motive". The personality of a corporation is only a fiction and it is not possible to attribute any mind to it, whether guilty or otherwise. Only those acts can be attributed to the corporation which are within the scope of the charter of incorporation of the corporation. Illegal acts are *ultra vires* and cannot be attributed to the corporation. Neither criminal liability nor tortious liability can be attributed to a corporation.

However, in the case of *Citizens Life Assurance Company v. Brown*<sup>2</sup>, a Superintendent of the company sent a circular letter to its policy-holders containing certain allegations against an ex-employee of the company. The ex-employee brought a suit against the company for damages. The question that arose for determination was whether a corporation was liable or not. It was held by Lord Lindley that the corporation was liable for the tort of defamation on the ground that it was liable for the torts of its servants committed in the course of their employment.

As regards the *criminal liability* of a corporation, it cannot have a guilty intention necessary for a crime as a corporation has no mind of its own. To begin with, corporations were exempted from criminal liability, but that is not the case today. They can now be punished for the offences of non-feasance and even misfeasance. This is so when a statutory duty is not performed by a corporation or the same is performed badly. In these cases, punishment is usually by way of fine.

According to Keeton, "In crime, the concurrence of three elements is necessary before liability can be properly attributed to the corporation :

- (1) The crime must be one in which it is not necessary to prove a guilty state of mind in the person charged.
- (2) The offence must be of a kind that the act or omission of the agent may also be said to be the act or omission of the corporation.
- (3) The punishment must be a fine, at least as an alternative, or some other punishment which may be inflicted on the corporation."

Critics point out that it is not desirable to punish corporations. If we punish a corporation, it really amounts to punishing the beneficiaries. It is not proper that the agents should do the wrongful acts and the beneficiaries should suffer. This is against natural justice. Moreover, a corporation cannot do or authorise any wrong and consequently should not be made liable for the wrongful acts of its agents outside the limits of their authority. However, it is maintained that the agents of a corporation are in reality the agents of the beneficiaries and consequently there is nothing wrong if the beneficiaries are made to suffer for the acts of omission and commission of their agents. The liability of a corporation is as much logical as the liability of any other ordinary employer. A corporation is held responsible on the ground that it should not have selected careless and dishonest agents.

### **The State as a Corporation**

The state is a legal person in international law. Recognition is one of the methods by which an international personality is conferred on a state. Recognition is a matter of fact and formal recognition is merely a matter of course. The United Nations also has a legal personality.

In the U. S. A. the state is recognised as a person. The federation is a person in law and the same is the case with the states. Legal proceedings are started in the name of "the State of New York" or "the people". In the case of India, the Union of India is recognized as a legal person. Suits can be filed against the Union of India and also by the Union of India. Likewise, the suits can be filed against the State Government in India and also by the State Governments against others.

For a long time, the law of England did not recognize the state as a corporation or a legal person. That was partly due to the monarchical form of government in the country. The king is a corporation sole and he holds all the powers and prerogatives of the Government. The public property in the eye of law belongs to the king. The actions of the Government are the actions of the king.

According to Holland, the state is a great juristic person and enjoys many quasi-rights against individuals and is liable to many quasi-duties in their favour. The state is usually a great landed proprietor. As such, it is entitled to servitudes over the estate of individuals and subject to servitudes for the benefit of such estates.

According to Jethrow Brown, "The personality of the state has not been recognized either by the poverty of our ideas or by the conservatism of our temperament and we are driven to the device of attributing privileges and responsibilities to the king

which are not really his." Again, "The legal recognition of the state is simply a matter of time."

It is to be observed that by the passing of the Crown Proceedings Act, 1947, the responsibility of the state has been recognized in England also. This is particularly so in the case of torts. It is true that the state has not been put on the same footing as other natural of legal persons but a good beginning has already been made.

### **Uses and purposes of incorporation**

There are many advantages of incorporation. (1) Collective ownership and collective actions are cumbersome in law. Law always prefers to convert a collective ownership into an individual ownership. This it does in two ways, *viz.*, by trusteeship and by incorporation. A trust can be created in the interests of the beneficiaries. The trustees are given the power to act, sue or be sued on behalf of the beneficiaries. In the case of incorporation, a fictitious person is brought into existence and given the power and authority to act on behalf of its members. In this way, it is not necessary to make all the share-holders as parties in the case. Incorporation secures permanence, uniformity and unity.

(2) The special purpose of incorporation is that it helps commerce. No individual is prepared to invest millions in a risky enterprise. He is always afraid of becoming a pauper. However, dangerous enterprises can be undertaken only by corporations. This is due to the limited liability of its members. Thousands of shares of a nominal value can be sold and the required money can be collected. If I have bought a share of Rs. 10/- only, my liability is to the extent of Rs. 10/- and nothing more. If the worse comes to the worst, I lose Rs. 10 and nothing more. My liability is merely a limited one. If the liability were an unlimited one, the whole of my assets could be snatched away to pay for the losses. It is obvious that even if millions are lost by a corporation, the share-holders suffer only to the extent of their shares. It goes without saying that one of the factors which has helped the growth of industry in modern times is the development of corporations.

(3) According to Keeton, "The advantages of incorporation have been the primary reasons for the creation of corporate bodies. In the first place, incorporation greatly simplifies legal procedure, enabling a person to proceed against one individual, instead of against a great number of persons. Conversely, the corporation proceeds as a single person. In addition, the death or withdrawal of a member occasions no inconvenience to the remaining members of the group through the necessity to withdraw also some portion of the common property, or even to terminate the association altogether—as would be the position if no corporation existed.

Thus, in a partnership, death of one member automatically terminates it, and on the withdrawal of a member, he takes his share of the property and profits with him. In a corporation, on the other hand, a member has a share in the corporation, and not a right to any particular portion of the corporation's assets, and the existence of the corporation itself is unaffected by his death or withdrawal, his share being transferred to some other person, who replaces him as a member. Thus, 'a corporation never dies.' It exists indefinitely, unless brought to an end in one of certain specified ways. Lastly, a beneficial development of modern law has resulted in the limitation of the financial liability of a member of the corporation. Although limited partnerships are now possible in most modern systems of law, a member of a partnership is more frequently liable to the full extent to his property, not only for his own actions, but for those of his partners as well, if committed in the furtherance of the partnership's activities. In a corporation, a member is only liable to the value of the interest he holds."

### Suggested Readings

Allen, C. K.	Legal Duties.
Berle and Means	The Modern Corporation and Private Property.
Drucker	Concept of the Corporation
Duff	Personality in Roman Private Law.
Farnsworth, A.	The Residence and Domicile of Corporations.
Friedmann	Law and Social Change.
Goodhart	Essays in Jurisprudence.
Gower	Modern Company Law.
Hallis	Corporate Personality.
Henderson, G. C.	The position of Foreign Corporations in American Constitutional Law.
Lloyd	The Law of Unincorporated Associations.
Maitland	Collected Papers.
Nekam	The Personality Conception of the Legal Entity.
Pollock	Essays in the Law.

## CHAPTER XVI

### TITLE

#### Definition and Nature of Title

The term "title" is derived from the term 'Titulus' of Roman law and 'Titre' of French law. According to Salmond, title is the fifth element of a legal right. To quote him, "Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner." However, Holland does not include title as an element of a legal right. A tendency is to be noticed towards the identification of title with right. According to Lord Blackburn, "The first question which arises is whether on these facts the plaintiff had any title in the ship...no title in the ship was conveyed." Austin does not approve of the use of title for right. His contention is that title is not the right itself but merely an element of right. While title indicates the idea of an investitive fact, right is a power, faculty or capacity conferred on a person and is founded in the title. The party entitled is invested with right by the investitive fact.

Legal rights are created by title. A person has a right to a thing because he has a title to that thing. According to Justice Holmes, "Every right is a consequence attached by the law to one or more facts which the law defines and wherever the law gives any one special right, not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true to him." It is these special facts which constitute the title. Title means any fact which creates a right or a duty. According to Salmond, "*The title is the de facto antecedent of which the right is the de jure consequent.*" If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other and these facts are the title of the right." A person may acquire a right on account of his birth or he may acquire the same by personal efforts later on but in both cases title is essential. Title is the root from which the rights proceed.

Holland does not approve of the use of the term title as it does not indicate the facts which transfer or extinguish rights. To quote him, "A fact giving rise to a right has long been described as a title, but no such well-worn equivalent can be found for a fact through which a right is transferred or for one by which a right is extinguished."



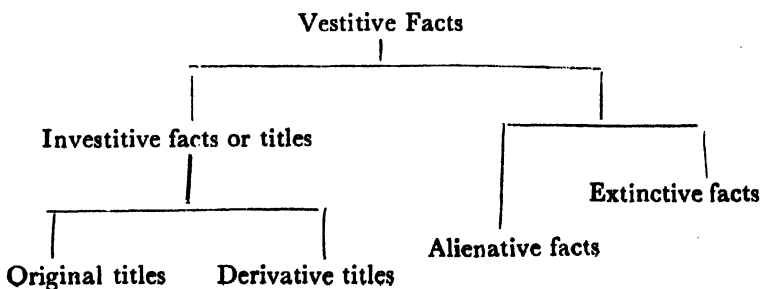
Bentham also objects to the use of the term title and suggests the term "dispositive facts." He divides the dispositive facts into three parts: investitive facts, divestitive facts and translative facts. He redivides the investitive facts into collative facts and impositive facts.

### Classification of titles

Titles are also called investitive facts or facts as a result of which a right comes to be vested in its owner. Salmond divides the vestitive facts into two parts, *viz.*, investitive facts or titles and divestitive facts. *Investitive facts* or titles are further divided into original titles and derivative titles. *Divestitive facts* are divided into alienative facts and extinctive facts. Vestitive facts are those which have relation to right. They relate to the creation, extinction and transfer of rights. Investitive facts create rights and divestitive facts destroy them. A right may be created *de novo* and it may have no previous existence. Such a right is called an *original title*. Examples of original title are my catching a fish from the river, my writing a new book, my invention of a new machine, etc. If a right is created by the transfer of a existing right, it is called a *derivative title*. If I buy fish from a fisherman who has caught the same from a river, my title is a derivative one. If the author of a book assigns the copyright of his book to another person, the latter acquires a derivative title.

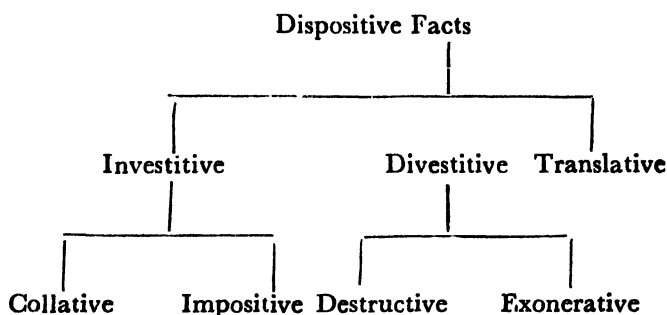
The facts of which the legal result is to destroy rights are called extinctive divestitive facts. The facts of which the legal result is to transfer rights from the owner are called alienative divestitive facts.

It is to be noted that in the case of a transfer of a right, the same facts are derivative investitive facts and alienative divestitive facts. If I sell my fish to X, it is derivative title so far as X is concerned and alienative divestitive fact so far as I am concerned. The main features of vestitive facts are that they either create a right, or extinguish it or transfer it from one person to another. The following table illustrates the classification of titles given by Salmond :—



A reference has already been made to the classification of Bentham. According to him, dispositive facts can be divided into three parts, *viz.*, investitive facts, divestitive facts and translative facts. Translative facts refer to the transferring of rights and duties. Investitive facts are divided into two parts: collative and impositive facts. Collative facts confer rights and impositive facts impose duties. Divestitive facts are sub-divided into destructive and exonerative facts. Destructive divestitive facts end rights and exonerative divestitive facts release persons from duties.

Bentham's classification can be illustrated by the following diagram :—



According to another classification, vestitive facts operate in pursuance of a human will or independently of the same. They are divided into two categories: acts of the law and acts in the law. Acts in the law are further divided into unilateral acts and bilateral acts. Unilateral acts are either subject to dissent or independent of the same. Bilateral acts or agreements are of four kinds, *viz.*, contracts, grants, assignments and releases. Contracts and grants are either creative or extinctive. Those are also valid or invalid.

### Acts in the law

Acts in the law are really the acts of the parties performed voluntarily. These facts create, transfer and extinguish rights. They express the will of the parties. Acts in the law are of two kinds: unilateral and bilateral acts. Unilateral acts are those in which the will of only one party is effective or operative. The transaction is perfectly valid even without the consent of the parties who are going to be affected. Examples of unilateral acts are a testamentary disposition, the exercise of a power of appointment, the avoidance of a voidable contract etc. The exercise by a mortgagee of his right of sale is unilateral. It is effective whether the mortgagor gives his consent or not. The same is the case with a will. The consent of the persons in whose favour the will is executed is not necessary.

Bilateral acts require the consenting will of two or more distinct persons or parties. Examples of bilateral acts or agreements are contracts, mortgages, leases, grants etc. It is to be observed that the same act in law may be unilateral with regard to some parties and bilateral with regard to others. If A entrusts property to B in trust for C, the conveyance is bilateral so far as A and B are concerned and unilateral so far as C is concerned. It is possible that C may not have any knowledge of the conveyance.

### Importance of Agreements

Great importance is attached to agreements between the parties. That is partly due to the fact that agreements are evidence of right and justice and the parties adjust their rights and liabilities by their own free consent. Moreover, agreements create rights and duties. As legislation is the public declaration of the rights and duties of the subjects, likewise an agreement is a private declaration of the rights and duties of the parties concerned. Ordinarily, agreements are enforced by the courts. An agreement constitutes the best evidence of justice between the parties and should be enforced. It is proper to fulfil the expectations of the parties based on their mutual consent if the same is not opposed to the idea of natural justice.

### Kinds of Agreements

There are three kinds of agreements. Some of them create rights, some transfer them and the others extinguish them.

(1) The agreements which create rights are of two kinds: contracts and grants. Contracts create rights and obligations among the parties in personam. A contract creates a legal tie of a personal right and that tie binds the parties. According to Salmond, contracts are bilateral but there are some unilateral contracts as well. Contracts are unilateral when a promise is made by one party and accepted by the other. Grants are agreements by which rights other than contractual rights are created.

(2) Agreements which transfer rights are called assignments.

(3) There are agreements which extinguish rights and those are known as releases.

An agreement may be *valid* or *invalid*. A valid agreement is one which is enforced by the courts of law of the country. It is in accordance with the true intention of the parties. Invalid agreements are those which have some defect in them and that defect prevents them from being fully operative. Invalid agreements are of two kinds, *viz.*, *void* and *voidable*. Void agreements

are those which are not recognised at all by law. The will of the parties does not matter in such cases. A voidable agreement is one which by reason of some defect in its origin is liable to lose its effect at the option of one or more parties. A voidable agreement is not null and void from the very beginning. However, it can be challenged by a party concerned and in that case it becomes void from the date on which it was entered into. The effect of nullification is retrospective and not prospective. Voidable agreements occur in the case of coercion, fraud or misrepresentation. A voidable contract lies mid-way between a valid and a void contract.

### **Validity of Agreements**

(1) Salmond points out many defects which make an agreement invalid. Incapacity of the parties may render an agreement invalid. In the eye of law, certain persons are not competent to enter into contracts and consequently contracts by them are invalid. This is so in the case of minors and lunatics.

(2) There are certain agreements which require certain legal formalities to be fulfilled and if those formalities are not fulfilled, the agreement becomes invalid. The want of a written agreement, the non-registration of an agreement or the omission of the signatures of the parties, may make an agreement invalid. The formalities are imposed by law with a view to prove satisfactorily the consent of the parties to the terms and to distinguish the actual agreement from the negotiations leading to it.

(3) Some agreements are declared to be invalid by law. Such agreements are immoral or against public policy. Examples of such agreements are the wagering contracts or the agreements in restraint of trade.

(4) An agreement may become invalid on account of some error or mistake. A mistake may be either essential or unessential. In the case of an essential mistake, the parties do not in reality mean the same thing and do not agree to anything. If X agrees to sell land to Y and while X is thinking of one piece of land, Y thinks of another piece of land, the agreement becomes invalid on account of an essential mistake. In the case of an unessential mistake, it does not relate to the nature or contents of the agreement, but only to some external circumstances which induced one party to give his consent and which does not make the agreement invalid. It is the duty of the buyer to be beware and if he has failed to do so, he cannot be allowed to take advantage of his own mistake.

(5) An agreement also becomes invalid if the consent of any of the parties is obtained by means of compulsion, undue influence

or coercion. Only that agreement is valid which has been entered into with the free consent of the parties.

(6) If there is a want of consideration in a particular agreement, that agreement becomes invalid. Law requires that if an agreement is to be valid, it must be for a valuable consideration. The consideration must be valuable although it may not be adequate. Even the inadequacy of consideration is taken into account to find out whether the consent of the promisor was freely given or not. According to Section 25 of the Indian Contract Act, an agreement without consideration is void. However, there are certain exceptions to the general rule.

### **Suggested Readings**

- Austin** : Jurisprudence.
- Holmes** : The Common Law.
- Paton** : Jurisprudence.
- Pollock** : First Book of Jurisprudence.
- Salmond** : Jurisprudence.

## CHAPTER XVII

### LIABILITY

#### Definition and Nature

According to Salmond, "Liability or responsibility is the bond of necessity that exists between the wrong-doer and the remedy of the wrong." According to Markby, "The word liability is used to describe the condition of a person who has a duty to perform." Liability implies the state of a person who has violated the right or acted contrary to duty. However, Austin prefers to use the term 'imputability' to 'liability'. To quote him, "Those certain forbearances, commissions or acts, together with such of their consequences, as it was the purpose of the duties to avert, are imputable to the persons who have forborne, omitted or acted. Or the plight or predicament of the persons who have forborne, omitted or acted, is styled imputability." The liability of a person consists in those things which he must do or suffer. It is the ultimatum of the law and has its source in the supreme will of the state. A person has a choice in fulfilling his duty and his liability arises independently of his choice. It cannot be evaded at all. Liability arises from a wrong or the breach of a duty.

#### Kinds of Liability

Liabilities can be of many kinds. Those are civil and criminal liability, remedial and penal liability, vicarious liability and absolute or strict liability.

(1) *Civil Liability* is the enforcement of the right of the plaintiff against the defendant in civil proceedings. *Criminal liability* is the liability to be punished in a criminal proceeding. A civil liability gives rise to civil proceedings whose purpose is the enforcement of certain rights claimed by the plaintiff against the defendant. Examples of civil proceedings are an action for recovery of a debt, restoration of property, the specific performance of a contract, recovery of damages, the issuing of an injunction against the threatened injury, etc. It is possible that the same wrong may give rise to both civil and criminal proceedings. This is so in cases of assault, defamation, theft and malicious injury to property. In such cases, the criminal proceedings are not alternative proceedings but concurrent proceedings. Those are independent of the civil proceedings. The wrong-doer may be punished by imprisonment. He may be ordered to pay compensation to the injured party. The outcome of proceedings in civil and criminal liability is generally different. In the case of civil proceedings, the remedy is in the form of damages, a judgment for the payment of a debt, an injunction, specific performance,

delivery of possession of property, a decree of divorce, etc. The redress for criminal liability is in the form of punishment which may be in the form of imprisonment, fine or death. In certain cases, the remedy for both civil and criminal liability may be the same *viz.*, the payment of money. In certain cases, imprisonment may be awarded for both civil and criminal liability. Even in a civil case, if a party dares to defy an injunction, he can be imprisoned. Civil liability is measured by the magnitude of the wrong done but while measuring criminal liability we take into consideration the motive, intention, character of the offender and the magnitude of the offence.

## (2) *Theory of Remedial Liability*

According to this theory, if a duty is created by law, the latter should see to it that the same is performed. The force of law can be used to compel a person to do what he ought to do under the law of the country. If an injury is caused by the violation of a right, the same can be remedied by compelling the person bound to comply with it. There is no idea of punishment in the theory of remedial liability. However, there are *three exceptions* to the general rule that a man must be forced to do so by the force of law what he is bound to do by a rule of law. The first exception is in the case of an imperfect obligation or duty. The breach of an imperfect duty does not give rise to a cause of action. A time-barred debt creates an imperfect duty and the same cannot be enforced by any court of law. The second exception is in those cases where duties are impossible of specific enforcement. Once a libel or defamation has been committed, its specific enforcement is not possible. Once the mischief has been done, it cannot be undone. The only thing that can be done is to make provision against the future. The third exception is in those cases where the specific enforcement of the duty is inexpedient or inadvisable. Law does not enforce the specific performance of a promise of marriage but is prepared to award damages.

## (3) *Theory of Penal Liability*

The theory of penal liability is concerned with the punishment of wrong. Punishment is of four kinds *viz.*, deterrent, preventive, retributive and reformatory. The chief object of punishment is deterrent. A penal liability can arise either from a criminal or from a civil wrong. There are three aspects of penal liability and those are the conditions, incidence and the measure of penal liability. As regards the conditions of penal liability, it is expressed in the maxim *actus non facit reum, nisi mens sit rea*. This means that the act does not constitute a guilt unless it is done with a guilty intention. Two things are required to be considered in this connection and those are the act and the *mens rea* or the guilty mind of the doer of the act. *Mens rea* requires the consideration of intention and negligence. The act is called the material condition of penal liability and the *mens rea* is called the formal condition of penal liability.

#### (4) *Vicarious Liability*

Ordinarily, only that person is liable for a wrong which he has committed himself. However, there are certain cases where one person is made liable for the wrongs committed by another. Such cases are examples of vicarious liability.

It is to be observed that criminal liability is never vicarious except in very special circumstances. However, civil law recognizes vicarious liability in two classes of cases. A master is responsible for the acts of his servants done in the course of their employment. Likewise, legal representatives are liable for the acts of dead men whom they represent.

As regards the liability of a master for the acts of his servants, it is based on the legal presumption that all acts done by his servants in and about his master's business are done by the express or implied authority of the master. Under the circumstances, the acts of the servant are the acts of the master for which he can be justly held responsible. Salmond points out that there are two justifications for the principle of vicarious liability. It is very difficult to prove actual authority and very easy to disprove it in all cases. There are many difficulties in the way of proving the actual authority which is necessary to establish a conclusive presumption of it. Moreover, while employers are usually financially capable of putting up with the burden of civil liability, that is not the case with their servants. If a servant commits any wrong and a suit is filed against him for damages, the injured party can never be sure of realizing the damages even if a decree is passed in favour of it. That is due to the financial resources of the servants in general. However, if a decree is secured against the employer, there are better chances of recovering the amount on account of the larger resources of the employer.

The common law maxim was that a man cannot be punished in his grave. Under the circumstances, it was held that all actions for penal redress must be brought against the living offender and must die with him. However, the old rule has been superseded. At present the representatives of a dead man are liable for the wrongs done by him while living. The right of the injured party to receive redress continues against the representatives of the dead man. This is possible only in civil cases, but in criminal cases, criminal liability dies with the wrong-doer himself.

#### (5) *Absolute or Strict Liability*

Both in civil and criminal law, *mens rea* or guilty mind is considered necessary to hold a person responsible. However, there are some exceptions to the general rule. In those cases, a person is held responsible irrespective of the existence of either wrongful intent or negligence. Such cases are known as the wrongs of absolute liability. In such cases, a person is punished for com-



mitting wrongs even if he has no guilty mind. The law does not enquire whether the guilty person has committed the wrong intentionally, negligently or innocently. It merely presumes the presence of the formal conditions of liability. There are many reasons why provision is made for absolute liability but the most important reason is that it is difficult to secure adequate proof of the intention or the negligence of the offender.

The most important *wrongs of absolute liability* fall into three categories, *viz.*, mistakes of law, mistakes of fact and accidents.

(1) Absolute responsibility in the case of a *mistake of law* is based on the legal maxim that ignorance of law is no excuse (*Ignorantia juris neminem excusat*). Even if a person commits an offence on account of a mistake of law, that is no excuse in the eye of law. He is liable to be punished although he had no guilty mind at the time of committing the offence. There are many reasons why a mistake of law is not considered as an excuse for committing the offence. Law is the embodiment of commonsense and natural justice and hence must be obeyed. Law both can and should be limited in extent. According to Salmond, "The law is in legal theory definite and knowable ; it is the duty of every man to know that part of it which concerns him ; therefore, innocent and inevitable ignorance of the law is impossible. Men are conclusively presumed to know the law, and are dealt with as if they did know it, because, in general, they can and ought to know it." According to Austin, "The reason for the rule in question would seem to be this. It not frequently happens that the party is ignorant of the law, and that his ignorance of the law is inevitable. But if ignorance of law were a ground of exemption, the administration of justice would be arrested. For, in almost every case, ignorance of law would be alleged. And for the purpose of determining the reality and ascertaining the cause of the ignorance, the courts were compelled to enter upon questions of fact, inscrutable and interminable. . . . That the party shall be presumed peremptorily cognizant of the law, or (changing the shape of the expression) that his ignorance shall not exempt him, seems to be a rule so necessary that law would become ineffectual if it were not applied by the courts generally."

However, there are certain *exceptions* to the general rule that the *ignorance of law is no excuse*. The above principle applies only to the general laws and not to any special law. Ignorance of a special law is excusable. No person can be held guilty for the violation of the foreign law of any country. It also does not apply to the rules of equity as developed in England.

(2) In criminal cases, a *mistake of fact* is a good defence against absolute liability. However, in the case of civil law, a *mistake of fact* involves absolute liability. According to Salmond, "It is the general principle of law that he who intentionally or

semi-intentionally interferes with the person, property, reputation or other rightful interests of another, does so at his peril, and will not be heard to allege that he believed in good faith and on reasonable grounds in the existence of some circumstances which justified his act. If I trespass upon another man's land, it is no defence to me that I believed it on good grounds to be my own."

(3) *Inevitable accident* is commonly regarded as a ground of exemption from liability in civil and criminal cases. An accident is either culpable or inevitable. It is *culpable* when it is due to negligence. It is *inevitable* when its avoidance requires a degree of care exceeding the standard demanded by law. There is one important exception to the above rule in civil law. There are cases in which law provides that a man shall act at his peril and shall take his chance if an accident happens. If a person keeps wild beasts, lights a fire, constructs a reservoir of water, accumulates upon its land any substance which can do damage to his neighbours if it escapes or erects dangerous structures by which passengers on the highway can be harmed, he does all these things at his peril and has to pay damages to the injured parties. In the case of *Rylands v. Fletcher*, it was held that "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he is responsible. If it does escape, and causes damage he is responsible, however careful he may have been and whatever precaution he may have taken to prevent damage."

### General Conditions of Liability

Certain general conditions must be satisfied before liability can arise. Those conditions are the act, omission or forbearance contrary to law on the part of the person liable which causes injury, *mens rea* or guilty mind or the breach of strict duty on the part of the wrong-doer and the consequences which may take the form of damage or harm to the injured person.

#### (1) Acts

An act has been defined as a muscular contraction but such a definition is not suitable for penal liability. A muscular contraction may be due to a disease and there can be no penal liability for the same.

According to Salmond, "An act is any event subject to human control." According to Austin, an act is a bodily movement caused by volition which is a movement of the human will. According to Holland, an act is a determination of will which produces an effect in the sensible world.

Acts can be classified variously. An internal act is an act of the mind and an external act is an act of the body. An

external act always involves an internal act but an internal act does not necessarily involve an external act. Internal and external acts are also known as inward and outward acts. According to Holland, mere determinations of the will are inward acts. Determination of will which produces an effect on the world of senses, is called an outward act. Jurisprudence is concerned only with outward acts.

Acts may be positive or negative. A positive act is one in which something is actually done. A negative act is one where something is refrained from being done. Positive acts are acts of commission and negative acts are called forbearances.

An act may be intentional or unintentional. An intentional act is one whose result is foreseen and desired by the doer. An unintentional act is one whose result is not foreseen or desired. In both these cases, the act may be external or internal or positive or negative. An act is not necessarily confined to intentional act. It may also be unintentional.

Examples may be given to illustrate the above categories of acts. If a person shoots a bird, his act is positive and intentional. X has an intention of killing Y. It is an internal act. If he buys a pistol with that intention, his act is both positive and intentional. X owes money to Y and does not pay the same in spite of demand. The act of X is negative and intentional. I am invited to a dinner. If I do not go to the dinner intentionally, my act is negative and intentional. If I miss the dinner because I forget all about it, my act is negative and unintentional.

### **Factors of an Act**

According to Salmond, every act is made of *three parts viz.*, the mental and bodily activity of the doer, the circumstances and the consequences. If a person is murdered, many things are done before the murder takes place. First of all comes the idea in the mind of the murderer to murder a person. Then he has to plan as to how the murder is to be committed. The pistol has to be bought or somehow secured. The same is the case with cartridges. Then the occasion has to be found for shooting the person. The person must be shot at the place where the shot is likely to be fatal. There are some writers who take into account only the immediate consequences of the act and not the incidental ones. According to Austin, "The bodily movements which immediately follow our desire of them are the only acts strictly and properly so-called." However, such a view is not accepted as being illogical. An act must include not only the physical movements but also the circumstances and results of the act. According to Holland, the essential elements of an act are an exertion of the will, an accompanying state of consciousness and manifestation of the will.

## **Juristic Acts**

According to Holland, a juristic act is "a manifestation of the will of a private individual directed to the origin, termination or alteration of rights." According to another definition, a juristic act is "an act the intention of which is directed to the production of a legal result."

## **Wrongful Acts**

Wrongful acts are those which are considered to be mischievous in the eye of law. Wrongful acts are of two kinds. There are wrongful acts which are actionable *per se* without proof of actual damage. There are others where actual damage has to be proved before the offender can be punished. Examples of such wrongful acts are slander, negligent driving, etc.

## **Damnum Sine Injuria**

There can be cases in which damage is caused but no injury is recognized in the eye of law. All wrongs are mischievous acts but all mischievous acts are not wrongs. The immunity from liability is due to the fact that while some harm is done to an individual, a greater good is done to society at large. This is so in the case of competition in trade or business. It is possible that a particular businessman may be completely ruined on account of competition but he cannot go to a court of law and demand damages. Fair competition does not create any liability. Sometimes, the offence committed is so trivial, indefinite and difficult to prove, that it is not considered desirable to take action against the offender. It is difficult for law to measure the amount of mental pain or anxiety suffered by a particular person. There is also no liability if a person drains the well of a neighbour by digging another well on his land. Likewise, if a person steals a few grains of wheat, law does not take notice of it.

## **Injuria Sine Damnum**

There are cases which are actionable even if there is no proof of actual damage. This happens when a legal right is violated. It is not considered necessary to prove that actual damage has been suffered by the plaintiff. In the case of *Ashby v. White*, the plaintiff was a qualified voter for a parliamentary seat. He was not allowed to vote by the returning officer. However, the person for whom he wanted to vote, was duly elected to Parliament. In spite of that, the plaintiff filed a suit against the returning officer. The suit was decreed in his favour on the ground that refusal to record the vote of the plaintiff caused an injury to the plaintiff in the eye of law.

## **(2) Circumstances of the Act**

It is necessary to take into consideration the time and place of the commission of the act. It is important to know as to where

the act was commenced and where the same was completed. These facts help to determine the jurisdiction of the court which has to try the offence.

### (3) **Mens Rea**

It has rightly been pointed out that an act alone does not amount to guilt unless it is accompanied by a guilty mind. Both the act and the *guilty mind* (*mens rea*) must concur to hold a person penally liable. "The *mens rea* includes two distinct mental attitudes of the doer towards the deed. These are intention and negligence. Generally speaking, a man is penally responsible only for those wrongful acts which he does either wilfully or negligently." The *mens rea* may be in the form of wrongful intention or culpable negligence. The wrongful act may have been done purposely or carelessly. In either case, the offender is penally liable. If the action is neither intentional nor negligent, there is no purpose in punishing him.

It is to be observed that persons who are permanently or temporarily incapable of a guilty mind are not considered to be liable for their acts. In the case of drunkenness and insanity, the offender is considered to be incapable of forming the necessary intention which constitutes a crime. Likewise, nothing is an offence which is done by a child under seven years of age under the Indian Penal Code. In the case of a child between 7 and 12, he is considered liable only if he has attained a sufficient maturity of understanding as to judge the nature and consequences of his actions.

However, in certain circumstances, law does not take into consideration the *mens rea* at all. An offender is held responsible independently of any wrongful intention or culpable negligence. Such wrongs are called the wrongs of absolute liability and their number is increasing every day. The tendency in modern times is to impose responsibility for loss or damage whether the wrong-doer had a guilty mind or not. The rule of absolute liability is of very wide application. The responsibility of a newspaper in actions of defamation is not in any way dependent on *mens rea*. The case of *Hutton v. Jones* clearly proves it.

In the case of *Sherras v. De Rutzen*, it was held that *mens rea* is an essential element in every offence except in three cases *viz.*, cases criminal in form but which are really only a summary mode of enforcing a civil right, public nuisances and cases not criminal in any real sense but which in the public interest are prohibited under a penalty. The law of self-preservation is also an exception to the general rule. According to Hobbes, "If a man by the terror of present death be compelled to do an act against the law, he is totally excused; because no law can oblige a man to abandon his self-preservation."

*Mens rea or guilty mind includes three elements viz., wrongful motive, wrongful intent and negligence.* As regards *motive*, the general rule is that motive is not an essential element of a crime. A rightful act does not become wrongful on account of a bad motive. Likewise, a wrongful act does not become rightful if it is done with a good motive. Even if a person violates a traffic law on the plea that he is hurrying a sick man to the hospital, he is guilty of a wrongful act. Thus, motive does not affect the existence of criminal liability although it may affect the measure of liability. According to Lord Watson, "The law of England does not take into account motive constituting an element of civil wrong. Any invasion of the civil rights of another person is itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed whether the motive which prompted it be good, bad or indifferent." According to Lord Macnaughten, "It is the act, not the motive for the act, that must be regarded. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable." According to Lord Herschell, "It is certainly a general rule of our law that an act *prima facie* lawful is not unlawful and actionable on account of the motives which dictated it." In the case of *Bradford v. Pickles*, it was held that "no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."

There are certain *exceptions to the general rule that wrongful motive is immaterial in a civil wrong* and those are malicious prosecution, injurious falsehood, defamation on a privileged occasion and conspiracy.

(1) The term malicious ordinarily means ill-will or spite but in the eye of law, it implies a wrongful intention and wrongful motive. A malicious wrong is either intentional or wrong done with a wrongful motive. Malicious prosecution means a prosecution based on a wrongful motive. If a person is to be held guilty of malicious prosecution, it must be proved that he had an ulterior intent of a wrongful nature. Motive is also relevant in certain cases of defamation. If the defendant takes up the plea of privilege in a defamation case, he can succeed only if he proves that he had no bad motive.

(2) A bad motive is also essential in the case of *criminal attempts*. An attempt has been defined by Stephens as "an act done with intent to commit crime which would have succeeded but for interruption." According to the German Code, an attempt

is "an act with intent of crime amounting to commencement of execution". According to Salmond, an attempt is something which is wrongful on the face of it. Any act which is ostensibly innocent cannot be an attempt. If the result of a successful attempt is a crime, the attempt is a crime. It is a criminal attempt to put one's hands into the pocket of another. There is the possibility of depriving the other person of the money in his pocket. If I mix arsenic in flour with the intention to kill rats, it is an innocent act. However, if I do so with the object of killing another person, it is a criminal attempt.

(3) In certain offences, a particular motive is prescribed as an ingredient of the offence. In such cases, motive also becomes relevant. For example, if a person enters the property of another person with the motive of annoying or intimidating any occupant of that property, it amounts to a criminal trespass. However, if he enters the property without any such motive, there is no criminal trespass but only a civil trespass for which the remedy is only damages.

(4) While deciding the sentences to be imposed upon an accused person, the court takes into consideration the motive with which the offence was committed. If a father steals a loaf of bread to feed his child, he is shown leniency at the time of punishment. But, if he removes the ornaments of a child, he is punished severely. It is obvious that the motive with which the offence is committed is relevant in certain cases.

The maxim "*Actus non facit reum nisi mens sit rea*" means that the act does not make guilty unless there is a guilty mind. Two conditions must be satisfied before a criminal liability can be imposed. The first condition is a physical condition which means the existence of an unlawful act. The second condition is the *mens rea* or the guilty mind. Unless and until both these conditions are present at the same time no criminal liability arises.

### Stages in the commission of a crime

There are four stages in the commission of a crime and those are *intention, preparation, attempt* and *completion*. Out of these, intention and preparation are usually innocent but attempt and completion are grounds of legal liability. Mere intention of evil design, not followed by an act, does not constitute an offence. It is not possible for the judges to look into the breasts of the criminals. Mere preparation is not enough to constitute a crime. However, preparation is punishable in India in three cases *viz*, preparation to wage war against the Government of India, preparation to commit depredation on territories of any power at peace with the Government of India and preparation to commit dacoity.

It is not easy to say as to at what stage an attempt becomes a part of the completed crime. It is difficult to say when the

stage of preparation finishes and that of attempt starts. According to Salmond, an act innocent on the face of it does not amount to an attempt and consequently does not give rise to a criminal liability. An act *prima facie* wrongful is a criminal act. Buying a matchbox does not amount to an attempt to commit arson. However, preparing dies amounts to an attempt to counterfeit coins. Evidence can be led to show whether a particular act is in the stage of preparation or attempt.

### **Jus Necessitatis**

Ordinarily, all wrongful acts done deliberately are punishable under the law. However, there is an exception to this general rule known as *jus necessitatis* or the right of necessity. It is based on the principle that necessity knows no law. Law allows a person to do that from which he cannot be held back by any threat of punishment. If the necessity is so urgent and unavoidable that a person is determined to do a thing in spite of the provision of punishment, law considers it useless to punish such a person. A person is forced to commit a crime under the threat of immediate death. There is no *mens rea* in such a case. There is no alternative between good and evil. The same is the case with a sailor who is faced with starvation after ship-wreck and who kills another man and eats him. There are two ship-wrecked men clinging to a log of wood which cannot bear the weight of both. One of them pushes the other from the log and thereby the other person is drowned. The principle of *jus necessitatis* comes to the rescue of the offender.

### **Intention**

The *means rea* which is essential to constitute a liability takes two distinct forms *viz.*, wrongful intention and culpable negligence. According to Salmond, intention is "the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it, such fore-knowledge and desire being the cause of the act". According to Paton, a wrong is intentional only where the particular consequences which result from the act are foreseen and desired. Knowledge and desire are the necessary constituents of intention. According to Justice Holmes, "Intent will be found to resolve itself into two things ; foresight that certain consequences will follow from an act and the wish for those consequences working as a motive which induces the act."

Intention does not necessarily involve expectation. The consequences desired may not be expected. I may intend certain consequences which are absolutely improbable. Likewise, expectation does not amount to intention. A surgeon may know that his patient was likely to die in the course of operation but he intends the recovery of his patient and not his death. Intention implies full advertence in the mind of the person to his conduct.



An intention can only be inferred from the conduct of the doer. There is no other better method to do so. According to Brian C. J., "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man." According to Bowen L. J., "The state of man's mind is as much a fact as the state of his digestion."

The doer of an act is imputed the desire as to its inevitable consequences although those may not be present in his mind. A person causes grievous hurt to another with no intent to kill him. However, if the person dies, the offender is guilty of murder. Intention excludes negligence as negligence refers to unintended consequences of action. Generally, intention and knowledge go together. If a person intends a result, he knows that the result will follow the act. When he knows that a particular result will follow, he intends that result. However, this is not always the case. A General may order his troops to run in front of a firing machine-gun and capture the same, but he does not desire or intend their death. X shoots at Y who is actually out of the range of his gun. The intention to kill is there but there is the knowledge that Y will not be killed as he is out of the range of the gun.

*An intention differs from motive.* An act may be done with one immediate intent and another ulterior intent. The *ulterior intent* is called *motive*. A kills B to rob him of his luggage. The immediate intent is to kill B and the motive is to rob him. Sometimes, the immediate intent may be bad but the ulterior intent may be good. In spite of that, the act will be a wrongful one. Likewise, motive may be bad but the act may not be wrongful. This is so if a person opens a shop in competition against another and is prepared to sell his goods at a cheaper rate with a view to ruin the other.

### **Malice**

Malice implies wrongful intention. An act is done maliciously if it is done with a bad intention or a bad motive. Malice includes immediate and ulterior intention. Malicious prosecution implies a prosecution which is inspired by motive not approved of by law. It is only in exceptional cases that malice is considered to be relevant in determining the question of legal liability.

### **Negligence**

According to Salmond, negligence is "the state of mind of undue indifference towards one's conduct and its consequences". According to Willes, negligence is "the absence of such care as it was the duty of the defendant to use." According to Austin, negligence is the breach by omission of a positive duty. In his definition of negligence, Holland includes all those shades of inadvertence which result in injury to others but there is a total

absence of responsible consciousness on the part of the doer. Negligence can consist either *in faciendo* or *in non faciendo*; being either non-performance or inadequate performance of a legal duty. According to Clark, "Negligence is the omission to take such care as under the circumstances it is the legal duty of a person to take. It is in no sense a positive idea and has nothing to do with a state of mind." According to another writer "negligence is the absence of care according to circumstances." It has been held in a case that "negligence is the omitting to do something that a reasonable man would do or the doing something which a reasonable man would not do." Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence essentially consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. Negligence is nothing short of extreme carelessness. Carelessness excludes wrongful intention. A thing which is intended cannot be attributed to carelessness. Carelessness or negligence does not necessarily consist in thoughtlessness or inadvertence. It is true that it is the commonest form of negligence but it is not the only form. There can be a form of negligence in which there is no thoughtlessness or inadvertence. The essential of negligence is not inadvertence but indifference. A careless person is a person who does not care. To quote Salmond, "This term has two uses; for, it signifies sometimes a particular state of mind and at other times conduct resulting therefrom. The former is the subjective and the latter objective sense. In the former sense, negligence is opposed to wrongful intention; in the latter, it is opposed not to wrongful intention but to intentional wrong-doing.

Salmond uses the term negligence only in the subjective sense. According to him, negligence is essentially a state of mind. Negligence has a wider significance than inadvertence and thoughtlessness.

Negligence is of two kinds, according as it is accompanied by inadvertence or not. *Advertent negligence* is commonly called wilful negligence or recklessness. *Inadvertent negligence* can be called simple negligence. In the case of advertent negligence, the harm done is foreseen as probable but it is not willed. In the case of inadvertent negligence, the harm done is neither foreseen nor willed. In either case, carelessness or indifference as to the consequences is present. In the case of advertent negligence, the indifference does not prevent the consequences from being foreseen but in the case of inadvertent negligence the indifference does prevent the consequences from being foreseen.

According to some critics, negligence is not carelessness or indifference in all cases. However, the reply is that this view is not sound. In all cases which apparently show that there exists negligence without indifference, a careful examination discloses

the presence of indifference. A drunkard is walking along the road and he breaks a shop-window as he knocks against the same. The drunkard has to pay damages on account of negligence. It is true that the drunkard was taking all precautions to avoid any mishap, but he was liable for the loss as he was indifferent when he got himself drunk and started walking in the street in a state of drunkenness. He ought to have remained sober. X was an inefficient physician. In spite of all his devotion and care, he could not save the life of the patient on account of this inefficiency. He was held liable for damages for negligence. It is true that he was very careful in his work but he ought not to have undertaken the same as he was unfit to do so.

### **Negligence and Inadvertence**

A distinction is also made between gross negligence and slight negligence. Gross negligence implies a higher degree of negligence than that of the latter. There is no such distinction in English law. Negligence is called wilful if it is advertent. It is also called recklessness. In this kind of negligence, the harm done is foreseen as possible, or probable but it is not willed. In the case of an inadvertent negligence, the harm is neither foreseen nor willed.

According to some jurists, all negligence consists in advertence. An act is done negligently when the doer did not know that the act was wrong but could have found out if he had tried to do so. Two objections are raised by Salmond against this view. According to him, all negligence is not inadvertent. Even if a thing is known to be wrong, I may do the same with the hope that it will not result in wrong. I may have no intention that it should result in wrong. I may drive fast through a crowded street hoping that it will not result in any accident. Likewise all inadvertence is not negligence. I may not appreciate the consequences of my actions and that way I may not be negligent. I become negligent only if I become indifferent to results. I am not negligent if I take full care which can reasonably be expected under the circumstances. A man driving a car is negligent as he does not take care to remain sober.

### **Negligence and Intention**

According to Salmond, both intention and negligence are subjective. Both of them arise out of a state of mind. Intention is a mental element and the same is the case with negligence.

However, in the case of intention, the consequences of the act are both known and desired by the doer. In the case of negligence, the consequences of a negligent act are neither desired nor willed whether they are known or not. In the case of intention, it is presumed by law that the doer intends the natural consequences of

his act. Intentional wrong is punished as the injury is willed or desired. A negligent wrong is punished as the prevention of the injury is not sufficiently desired. The wrong-doer is liable because he is careless or indifferent. X fires at Y and kills him. The wrong is intentional as the death was desired. X fires in the direction of a crowd believing that the shot will not go as far as Y. Anyhow, Y is killed by his shot. X is guilty of negligence.

### **Culpable Negligence**

Carelessness becomes culpable when law imposes a duty of being careful. Criminal liability for negligence exists only in very exceptional cases. However, civil liability for negligence exists in most cases. There are certain exceptions to the above rules. A false statement is not a civil wrong if the person who made the statement honestly believed the same to be true. It is immaterial that he was careless in seeking the truth. An animal or a thing is borrowed gratuitously and if any damage is done to the borrower on account of a dangerous defect in the animal, the borrower is entitled to recover the damages if he is not duly informed of the defects. While measuring the degree of carelessness, two things are taken into consideration and those are the degree of the seriousness of the consequences possible and the extent to which those consequences were probable.

### **Duty of care**

A reference can be made to some cases to have a clear idea of the duty of care involved in the term negligence. In the case of *Donoghue v. Stevenson*, a manufacturer of ginger beer sold to a retailer ginger beer in an opaque bottle. The bottle contained the decomposed remains of a dead snail. However, that fact was not known to the manufacturer. The ginger beer was bought by a customer from the retailer and he poured some of it into a tumbler for a lady friend who drank it and became very ill. It was held that the manufacturer owed a duty to take care that the bottle did not contain any noxious matter and he was liable if the duty was broken. In another case, the defendants manufactured pants which contained some chemical that gave the plaintiff a skin disease when he wore them. It was held that the defendants were liable to the ultimate purchaser.

### **Standard of care**

According to Salmond, English law recognises only one standard of care and only one degree of negligence. Whenever a person is under a duty to take any care at all, he is bound to take that amount of it which is considered reasonable under the circumstances and the absence of which is culpable negligence. Many attempts have been made to establish two or even three standards of care and degrees of negligence. Some writers distinguish between gross negligence and slight negligence. There are others

who distinguish between gross, ordinary or slight negligence. These distinctions are based partly on Roman law and partly on a misunderstanding of Roman law. The distinctions are hopelessly indeterminate and impracticable. Salmond does not approve of those distinctions and contends that there is no reason of justice or expediency for doing so. To quote him, "The single standard of English law is sufficient for all cases. Why should any man be required to show more care than is reasonable under the circumstances or excused if he shows less?"

It is possible to adopt either of the two standards of care want of which amounts to negligence. Those *two standards* are the *highest degree of care of which human nature is capable* and the *amount of care which would be reasonable in the circumstances of the particular case*. The first standard is rejected and the second standard is accepted in actual practice. Law requires not what is possible but what is reasonable under the circumstances. Law does not require the greatest possible care in every case as all persons do not possess the highest degree of intelligence. Likewise, the standard of care required is not the care that can be exercised by the ordinary man or the average man. In some cases the standard adopted has been lower than the amount of care which a man of average prudence exercises. The standard of care is not the amount of care which the individual concerned would be capable of exercising in the circumstances or the amount of care which at the utmost it is possible for him to exercise.

Theoretically, negligence is the omitting of that which a reasonable man would do or the doing of that which a reasonable man would not do. However, in actual practice it is hard to define or discover that reasonable man or lay down any rule defining the amount of care necessary in any particular case. In the case of England, that amount of care is reasonable in the circumstances of a particular case which a jury of 12 men or the judge thinks ought to have been observed in that case. *The standard of care cannot be pre-determined. It is a variable thing which varies from case to case and time to time.*

While determining the amount of care necessary in any particular case, two factors must be taken into consideration. Those are the magnitude of risk to which others are exposed by the act and the amount of benefit to be derived from the act. If the driver of a car drives it at the speed of 40 miles an hour in the city, he is considered to be guilty of negligence. The danger of accidents arising out of high speed in the city is much greater than the benefit derived by the car-owner. However, if a train is run at the speed of 50 miles an hour and accidents take place from time to time, it is not considered to be negligence as the benefits enjoyed by the public on account of high speed are much greater than the risk of accidents. In the case of an architect, a physician or a surgeon, he is not required to exercise the skill of an ordinary

man or an average man. He must possess special skill before he takes up work. If he starts his work without acquiring the necessary skill required by law, he is liable to be held guilty for negligence.

### Theories of Negligence

There are many theories of negligence expounded by various jurists. (1) According to Austin, negligence consists essentially in *inadvertence*. It consists in a failure to be alert, circumspect or vigilant. A negligent wrong-doer is one who does not know that his act is wrong but who would have known it if he had not been mentally indolent. According to Salmond, this theory is inadequate. All negligence is not inadvertence. There is such a thing as advertent negligence in which the wrong-doer knows perfectly well the true nature, circumstances and probable consequences of his act. He foresees those consequences and yet does not intend them. His mental attitude is not one of intention but of negligence. Moreover, all inadvertence is not negligence. A failure on the part of a person to appreciate the nature of an act and foresee its consequences, is not culpable in itself. There is no justification for liability unless it is shown that there was carelessness in the sense of undue indifference. He who is ignorant or forgetful is not negligent. The signalman who sleeps at his post is negligent not because he falls asleep, but because he is not sufficiently anxious to remain awake. If his sleep is due to illness or excessive labour, he is free from blame. *The essence of negligence is not inadvertence but carelessness* which may or may not result in inadvertence. The advocates of the theory point out that there are in reality three forms of *means rea* and not two and those are intention, recklessness and negligence. In the case of intention, the consequences are foreseen and intended. In the case of recklessness, the consequences are foreseen but not intended. In the case of negligence, the consequences are neither foreseen nor intended. However, law brackets together recklessness and negligence under the head of negligence as both of them are the outcome of carelessness.

(2) According to Holland, negligence is of two kinds, gross negligence and simple negligence. However, this view is an old one and not recognised by English law.

(3) Sir John Salmond has propounded the *subjective theory of negligence*. According to him, negligence is purely subjective. It is something which is purely internal to the individual concerned. It relates to his state of mind. It is a mental condition. It is an attitude of indifference to the consequences of the act. Negligence is culpable carelessness. Although negligence is not the same thing as thoughtlessness or inadvertence, it is nevertheless essentially an attitude of indifference. Negligence consists in the mental attitude of undue indifference with respect to one's conduct and its consequences. According to Winfield, "As a

mental element in tortious liability, negligence usually signifies total inadvertence of the defendant to his conduct and for its consequences. In exceptional cases, there may be full advertence to both the conduct and its consequences. But in any event, there is no desire for the consequences, and this is the touch stone for distinguishing negligence from intention."

(4) According to the *objective theory of negligence*, negligence is not a subjective fact. It is not a particular state of mind but a particular kind of conduct. It is a breach of the duty of taking care against the harmful results of one's actions, and to refrain from unreasonably dangerous kinds of conduct. To drive at night without lights is negligence because all reasonable and prudent men carry lights with a view to avoid accidents. To take care is not a mental attitude or a state of mind.

According to the objective theory, negligence is an external fact and not a state of mind. It is a conduct resulting in the breach of duty to take care. According to Clark, "Negligence consists in the omission to take such care as under the circumstances it is the legal duty of a person to take." Negligence lies in pursuing a course of conduct different from that of a reasonable and prudent person.

According to Pollock, "Negligence is the contrary of diligence and no one describes diligence as a state of mind." Negligence is the breach of the duty of taking care against the harmful results of one's actions and to refrain from unreasonably dangerous kind of conduct.

In the law of torts, negligence consists in the failure to take such care as would be taken by a reasonably prudent man. It is a conduct which falls short of an external standard and is an objective one

Salmond criticizes the objective theory of negligence and points out that negligent conduct differs from negligence. Negligent conduct is a course of action which is the result of negligence. It is an objective fact which results from a state of mind. Moreover, all negligence is followed by a failure to take reasonable precautions. However, the converse is not true. The failure to take precautions is not always due to negligence. It may be due to accident or intention. From the purely objective point of view, it is not possible to decide whether an act was intentional, negligent or accidental. We have to take into consideration the state of mind as well.

Neither the objective theory nor the subjective theory is correct. Negligence is both subjective and objective. The two theories can be reconciled. They emphasize different aspects of negligence. As contrasted with wrongful intention, negligence is subjective. As contrasted with inevitable accident, negligence is

objective. If the intention is not relevant, the only thing to be considered is whether the doer took the amount of care required by law or not. The answer depends upon external facts which are independent of the state of mind. According to Keeton, "The law takes no heed of man's mind, except in so far as it expresses itself in material acts, and it is only when negligence (considered from the subjective standpoint) has resulted in acts occasioning damage, that the law takes notice of it."

### **Contributory Negligence**

Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person, when means and opportunity are afforded to do so. It is the non-exercise by the plaintiff of such ordinary care, diligence and skill as would have avoided the consequences of the negligence of the defendant. The doctrine of contributory negligence "rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by its own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred ; and that the defendant's negligence accordingly is not the true proximate cause of the injury". The law takes into consideration an act or conduct of the party injured or wronged which may have immediately contributed to that result. One who has by his own negligence contributed to the injury of which he complains cannot maintain an action against another in respect of it. He is considered to be the author of his own wrong in the eye of law. According to Lord Halsbury, the doctrine of contributory negligence is merely a special application of the maxim that *where both parties are equally to blame, neither can hold the other liable*.

There are cases in which the negligence of the parties is so contemporaneous as to make it possible to say that either could have avoided the consequences of the negligence of the other and in which both have contributed to the accident. When an accident is caused by the simultaneous negligence of two persons, neither of whom has time or opportunity to avoid it, neither can recover damages.

If the plaintiff himself has contributed to the misfortune by his own negligence or want of ordinary common care and caution, he is not entitled to recover damages. It should be proved that the plaintiff could by the exercise of ordinary care have avoided the consequences of the negligence of the defendant. If he could have avoided them by ordinary care and he has not done so, he is the author of his own wrong. Even if the plaintiff is guilty of negligence but if the defendant could avoid the mischief by the use of ordinary care and diligence, the negligence of the plaintiff cannot save the defendant. If the direct and immediate cause of damage is proved to be the fault of the defendant, contributory negligence



by the plaintiff cannot be established merely by showing that if the plaintiff had acted in a particular way, a different situation would have resulted in which the same mischief might not have occurred. Moreover, if the proximate cause of the injury is the want of reasonable care on both sides, the plaintiff cannot sue the defendant. In such a case, he cannot maintain that he has been injured by the negligence of the defendant. He can only say that he has been injured by his own carelessness and the negligence of the defendant. The plaintiff is without a remedy if the accident is the result of the joint negligence of the plaintiff and the defendant.

If contributory negligence is to be taken up as a defence, it must be that of the plaintiff himself or of his servant whom he has selected. The contributory negligence of a third person who is not the servant of the plaintiff is absolutely inadequate. The onus of proving contributory negligence on the part of the person injured rests upon the defendant. In the absence of evidence leading to that conclusion, the plaintiff is not bound to prove its non-existence. If the court finds itself unable to discover to what extent negligence of the plaintiff or the defendant contributed to bring about the accident, the defendant is entitled to succeed.

### Measure of Penal Liability

According to Salmond, three elements should be taken into consideration in determining the measure of criminal liability and those are the motive of the offence, the magnitude of the offence and the character of the offender.

(1) As regards *motive of offence*, other things being equal, the greater the temptation to commit the crime, the greater should be the punishment. The object of punishment is to suppress those motives which lead to crimes. The stronger these motives are, the severer must be the punishment in the case. If the profit to be gained from the act is great, the punishment should also be severe proportionately. However, there is an exception to the general rule. Certain offences may be committed on account of urgent necessity or other exceptional circumstances. If a person is forced to steal to feed his starving children, the law generally takes this fact into consideration to lessen the punishment.

(2) Other things being equal, the greater *the magnitude of the offence*, the greater should be its punishment. Such a consideration may seem to be irrelevant. It may be contended that punishment should be measured solely by profit derived by the offender and not by the evils caused to other persons. If two crimes are equal in point of motive, they should be equal in point of punishment. However, this is not the case in actual practice and this is due to two causes. The greater the mischief of any offence, the greater is the punishment which it is profitable to inflict with the hope of preventing it. It is worthwhile to hang any number of murderers

in order to deter one murderer and save one innocent person. However, it is not worthwhile to hang one person and stop all petty thefts. Another reason why different punishments are given for different kinds of offences is that such a system induces persons to commit the least serious offences. If punishment for burglary were to be the same as that for murder, the burglar would not stop at a lesser crime. There will be a temptation to commit offences of a very serious nature as punishment is the same in both cases. If an attempt is punished in the same way as a completed offence, the offender would not stop at the attempt but would like to complete the act as well.

(3) The *character of the offender* should also be taken into consideration while determining the measure of criminal liability. The worse the character or disposition of the offender, the more serious should be the punishment. The fact which indicates depravity of disposition is a circumstance of aggravation. It calls for a penalty in excess of that which would otherwise be appropriate to the offence. The law imposes upon habitual offenders penalties which bear no relation to the magnitude of the offence. A punishment which is suitable to a normal man, will be absolutely inadequate in the case of a hardened criminal. Experience shows that the badness of disposition is commonly accompanied by a deficiency of sensibility. If a person is of a depraved character, he loses all sense of shame. The most degraded criminals are said to exhibit insensibility even to physical pain. Many murderers of the worst type show indifference to death itself. In cases short of capital offences, it is desirable to punish more severely the more corrupt.

The Indian Penal Code provides that a previous convict should be awarded an enhanced period of imprisonment. The first offenders are usually let off or treated very leniently. Sometimes the offenders are let off on probation of good conduct on account of their age, character, antecedents or physical or mental condition of the accused and the circumstances in which the offence was committed.

### **Measure of Civil Liability**

In the case of a civil wrong, motive is irrelevant. It is only the magnitude of the offence that determines civil liability. The liability of the offender is not measured by the consequences which he meant to ensue, but by the evil which he succeeded in doing. The liability consists of the compulsory compensation to be given to the injured person and that is to be considered as a punishment for the offence. In penal redress, compensation in money is given to the injured person and punishment is imposed upon the offender. A rational system of law must combine the advantages of penal redress with a co-ordinate system of criminal liability. The reason is that penal redress alone is not considered to be sufficient,

## Crime and Tort

It is difficult to draw a clear-cut distinction between a crime and a tort. A tort today may be a crime tomorrow and *vice versa*. However, it is desirable to draw the distinction between the two terms.

According to Blackstone, torts are private wrongs and involve "infringement of the civil rights which belong to individuals considered merely as individuals". On the other hand, crimes are public wrongs and involve "a violation of the duties due to the whole community". Thus, the distinction between the two lies in the nature of offence. If the offence is serious, it is to be treated as a crime, and if it is not, it is to be treated as a tort.

Austin does not accept the view of Blackstone. He points out that some wrongs are both crimes and torts. For example, an assault or a malicious prosecution may be a tort as well as a crime. All public wrongs are not crimes. It is a public duty to pay tax to the state but a refusal to do so is not a crime. All crimes may not be public wrongs. The theft of a chair is a crime but it cannot be said that the public is affected thereby. The view of Austin is that the distinction between a crime and a tort is purely procedural. If the wrong is a crime, "the sanction is enforced at the discretion of the sovereign". In the case of a tort, "the sanction is enforced at the discretion of the party whose right has been violated". In the case of a crime, the machinery of law is set in motion by the state. In the case of a tort, the machinery is set in motion by the individual concerned. In the case of a crime, the state launches the prosecution and it can also withdraw the same. In the case of a tort, a suit for damages is brought by the party concerned. If he gets a decree in his favour, the state cannot interfere and lessen the amount. The state also cannot force a private individual to withdraw the suit filed by him against the wrong-doer.

The view of Salmond is that the views of both Blackstone and Austin are not correct. He points out that criminal proceedings can be started in many cases even by a private individuals. A criminal complaint can be filed even by the injured party. The view of Salmond is that the distinction between a crime and a tort is based on the nature of the remedy applied. In the case of a crime, the object of the legal proceedings is the punishment of the offender. However, that object is the payment of damages in the case of tort. The view of Salmond has been accepted by the courts in England, and a reference may be made to the case of Clifford and O'Sullivan *in Re*, (1921) 2 A. C. 570.

It is to be observed that there is some truth in all the views mentioned above. A crime has been defined as a breach of public duty, the sanction of which is punishment exigible or remissible at the discretion of the sovereign acting according to law. A tort is

defined as a breach of duty affecting private individuals, not arising out of trust or contract, the sanction of which is compensation exigible or remissible at the discretion of the party whose right has been infringed.

### Exemptions from Criminal Liability

The general rule is that a person is liable for any crime committed by him. However, there are certain exceptions to this general rule. The general rule does not apply in the case of a mistake of fact. If a person does something under a mistake without intending to do which he actually does, he is not criminally liable for his action. A police constable goes to arrest A but actually he arrests B thinking B to be A. In this case, the police constable is not guilty of any crime because there was no guilty mind when he arrested B. However, it must be noted that mistake must be reasonable, and there should be no liability for the act actually done under a mistake. In the case of Tolson, "a woman married another person under a bona fide belief that her husband had died in a ship-wreck. Later on, it was found that he had actually survived the ship-wreck. The woman was prosecuted for bigamy. However, she was acquitted.

Another exception is that a person is not held guilty when he does something under circumstances in which he is absolutely helpless. This is called the principle of *Jus necessitatis*. An example was given by Bacon to illustrate this. Two ship-wrecked sailors caught hold of a single plank which could carry only one of them. It was under those circumstances that one sailor pushed the other into the sea. The sailor who was saved, was prosecuted. It was held that he was not guilty on account of the circumstances in which he was placed. Likewise, if a person kills another person in self-defence, he also does not commit any offence. However, it is to be noted that there are certain limitations on the principle of *Jus necessitatis*. In *R. v. Dudley*, two ship-wrecked sailors ate a boy who was in their company in order to save themselves from starvation. They were prosecuted for murder. They took up the plea of *Jus necessitatis*. It was held that the plea of *Jus necessitatis* was not available to them. However, as the situation in which they were placed was an abnormal one, a recommendation was made to the Crown for mercy and their punishment was reduced to six months' imprisonment.

Another exception is in the case of infants when children under the age of 8 are exempted from criminal liability. It is presumed that children of tender age have no guilty mind.

Another exception is in the case of inevitable accident which cannot be averted by taking reasonable care. There is no intention because the consequences are not desired in the case of an accident. However, this principle is not absolute. It was held in the case of *Rylands v. Fletcher* that if a person keeps admittedly

dangerous property on his premises and harm is caused by its escape, that person is liable for the injury caused. The plea of inevitable accident is not available.

### Suggested Readings

Allen	Legal Duties.
Barnes and Teeters	New Horizons in Criminology.
Clark	Analysis of Criminal Liability.
East and Hubert	The Psychological treatment of Crime.
Fox, L. W.	The Modern English Prison.
Gault, R. H.	Criminology.
Gluck, S.	Crime and Justice.
Hall, J.	Theft, Law and Society.
Hooton, E. A.	Crime and the Man.
Lawson, F. H.	Negligence in the Civil Law (1950)
Mannheim, H.	War and Crime.
Mannheim, H.	The Dilemma of Penal Reform.
Mullins, C.	Crime and Psychology.
Mullins, C.	Why Crime?
Page, L.	Crime and Community.
Street	Foundation of Legal Liability.

## CHAPTER XVIII

### LAW OF PROPERTY

#### Meaning of Property

The term property is not a term of art. It has been used in a variety of senses.

(1) In its widest sense, property includes all the legal rights of a person of whatever description. The property of a man is all that is his in law. Such a usage of the term is common in old books although it is becoming out of fashion in modern times. According to Blackstone, "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior." According to Hobbes, "Of things held in propriety, those that are dearest to man are his own life and limbs; and in the next degree, in most men, those that concern conjugal affection and after them riches and means of living." According to Locke, "Every man has a property in his own person." Every individual has a right to preserve "his property, that is, his wife, liberty and estate."

(2) In a narrower sense, property includes the proprietary rights of a person and not his personal rights. Proprietary rights constitute his estate or property and personal rights constitute his status or personal condition. In this sense, the land, chattels, shares and debts due to a person are his property but not his life or liberty or reputation. This is the most usual sense in which the term is used in modern times but the other uses also have an equal authority.

(3) In another sense, the term property includes only those rights which are both proprietary and real. The law of property is the law of proprietary rights *in rem*. In this sense, a free-hold or lease-hold estate in land or a patent or copyright is property and not a debt or the benefit of a contract.

(4) In the narrowest use of the term, property includes nothing more than corporeal property or the right of ownership in material things. According to Ahrens, property is "a material object subject to the immediate power of a person."

(5) According to Austin, the term property is sometimes used to denote the greatest right of enjoyment known to the law excluding servitudes. Sometimes, life-interests are described as property. Even servitudes are described as property in the sense that there is a legal title to them. Sometimes, property means the whole of the assets of a man including both the rights *in rem* and rights *in personam*.

In modern times, intellectual or intangible property has become very important. Instances of such property are copyrights, trade-marks, property in designs and patents. According to Erle J., "The notion that nothing is property which cannot be earmarked and recovered in *detinu* or *trover*, may be true in an early stage of society when property is in its simplest form and the remedies for the violation of it are also simple, but it is not true in a more civilized state when the relations of life and the interests rising therefrom are complicated."

### Kinds of Property

Property is essentially of two kinds: corporeal and incorporeal. Corporeal property can be further divided into movable and immovable property and real and personal property. Incorporeal property is of two kinds: rights in *re propria* and rights in *re aliena* or encumbrances.

#### (1) Corporeal Property

Corporeal property is also called tangible property because it has a tangible existence in the world. It relates to material things. The right of ownership of a material thing is the general, permanent and inheritable right of user of the thing. Ownership of land and chattel consists in the sum-total of the rights of user.

(a) Corporeal property is of two kinds, *movable and immovable*. Land is an immovable property and chattels are movable property. According to Salmond, an immovable piece of land has many elements. It is a determinate portion of the surface of the earth. It includes the ground beneath the surface down to the centre of the world. It also includes the column of space above the surface *ad infinitum*. According to Coke, "The earth hath in law a great extent upwards, not only of water as hath been said but of air and all other things even up to heaven." According to the German Civil Code, the owner of land owns the space above it. He has no right to prohibit acts so remote from the surface that they do not affect his interests in any way. The right of free and harmless passage at a reasonable height over land is secured and governed by the Air Navigation Act, 1920. It also includes objects which are on or under the surface in its natural state, *e. g.*, minerals and natural vegetation. All these are a part of the land although they are not physically attached to it. Land also includes all objects placed by human agency on or under the surface with the intention of permanent annexation. Examples are buildings, doors, fences etc.

According to the General Clauses Act of 1897, "Immovable property includes land, benefits arising out of land and things attached to the earth or permanently fastened to anything attached to the earth." According to the Indian Registration Act, "Immovable property includes land, building, hereditary allowance,

rights of ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth but not standing timber, growing crops or grass." The Indian Transfer of Property Act excludes standing timber, growing crops and grass from the definition of immovable property.

Movable property includes all corporeal property which is not immovable.

### **(b) Real and Personal Property**

The distinction between real and personal property is closely connected with but not identical with the distinction between movable and immovable property. The connection is, however, historical and not logical. Real property means all rights over land recognized by law. Personal property means all other proprietary rights whether they are rights *in rem* or rights *in personam*. According to Salmond, "Real property and immovable property form intersecting circles which are very nearly though not quite coincident. The law of real property is almost equivalent to the law of land, while the law of personal property is all but identical with the law of movables. The partial failure of coincidence is due not to any logical distinction but to the accidental course of legal development; and to this extent the distinction between real and personal property is purely arbitrary and possesses no scientific basis. Real property comprises of rights over land, with such advantages and exceptions as the law has seen fit to establish. All other proprietary rights, whether *in rem* or *in personam*, pertain to the law of personal property."

### **(2) Incorporeal Property**

Incorporeal property is intangible property. It is also called intellectual or conventional property. It includes all those valuable interests which are protected by law. The recognition and protection of incorporeal property has been secured in recent times. Formerly, property in the form of land alone was considered to be all important. In modern times, a lot of property of the country is to be found in the form of the shares of limited companies. Millions of persons in every country possess such property.

#### **(a) Rights in Re Propria**

Incorporeal property is of two kinds *viz.*, rights *in re propria* and rights *in re aliena*. Rights *in re propria* are those rights of ownership in one's own property as are not exercised over material objects. Generally, the law of property deals with material objects. However, in some cases, ownership of some non-material things produced by human skill and labour is recognized as property. The most important of such rights are patents, literary



copyright, artistic copyright, musical and dramatic copyright, commercial goodwill, trade-marks and trade-names.

(i) The subject-matter of a patent is the new idea or particular process of manufacture produced or discovered by human skill and labour. Patents become commercially valuable as a monopoly of exploitation is given to the patentee. Law takes action against those who infringe in any way the patents.

(ii) Literary copy-right is possessed by the author of the books. No person is allowed to print it and if he does so, he is liable to be punished. Literary copyright is a great boon to the writers of the world. It is this right which enables them to earn their livelihood and also make provision for their successors. The copyright exists not only during the life-time of the author and the co-author, but even after their death.

(iii) In the case of artistic copyright, the subject-matters are the particular designs or forms. The artist alone has the exclusive use of design or form. Such a copyright exists in the case of drawing, painting, photography, etc.

(iv) Musical and dramatic copyright consists in musical and dramatic works. The composer, musician and the dramatist have the exclusive right to the use of their things. Any unauthorised performance or representation is liable to be punished with imprisonment or fine or both.

(v) The goodwill of a company is a valuable right acquired by a person by his labour and skill exercised for a considerable period. Very often, the sale of goodwill brings a lot of money to its owner.

(vi) Trade names and trade marks are also the property of persons who own them. They protect the public from the cheaters. They guarantee a particular quality of goods.

(vii) Holland adds a new type of intangible property to the list. To quote him, "With such intangible property should probably also be classified those royal privileges subsisting in the hands of a subject which are known in English law as franchises, such as right to have a fair or market, a forest, free warren or free fishery."

## **(b) Rights in Re Aliena**

Rights *in re aliena* are known by the name of encumbrances. They are rights *in rem* over a *res* owned by another. Such rights run with the *res* encumbered. They bind the *res* in whosoever hands it may pass. Encumbrances are the rights of particular user as distinguished from ownership which is the right of general user. Encumbrances prevent the owner from exercising some definite rights with regard to his property. The main kinds of encumbrances are leases, servitudes, securities and trusts,

**(i) Leases**

A lease is an encumbrance giving a right to the possession and use of the property of another person. A lease is the transfer of a right to enjoy certain property. The lease is either for a certain period or in perpetuity. It is an agreement by which the owner of the property or the lessor transfers his right of possession to the lessee. It is not an absolute transfer of all rights in the property. It is merely a partial transfer. What is transferred is merely the right of possession and the use of property. It separates ownership from property.

Ordinarily, a lease is with respect to land. However, every right that can be possessed can be made the subject of a lease. Thus there can be the lease of copyright, a patent, right of way, right to receive interest on government promissory notes, etc.

**(ii) Servitudes**

A servitude is "that form of encumbrance which consists in a right to the limited use of a piece of land without possession of it." According to Paton, the holder of a servitude has a right in rem which gives him the power either to put a res belonging to another to a certain class of definitely limited uses or else to prevent the owner of the res from putting it to a certain class of definitely determined uses. There is no possession in the case of a servitude and this distinguishes it from a lease. If I secure exclusive possession of a piece of land without getting its ownership, I acquire a lease. If I acquire the right to use that land in some definite way without getting either its ownership or possession, I acquire only a servitude. Generally, servitudes exist with respect to land only. Examples of servitudes are the right of way across the land of somebody, the right of light and air, the right of view of prospect, the right of the public to pass across a land, right of pasturage, right of recreation on a piece of land, right of fishing, public right of navigation, etc.

**Kinds of servitudes**

Servitudes have been classified in many ways. Some classify them as *prædial* and *personal* and *positive* and *negative*. A *Prædial or real or appurtenant servitude* is that which is enjoyed by the owner for the time being of land or a house over another piece of land. The land at the house is called the *dominant tenement* and the other piece of land is called the *servient tenement*. Such a servitude is a right of using one property for the benefit of another property. It is accessory to the dominant property. The servitude passes with the transfer of the dominant tenement. That is why it is called "*appurtenant to the dominant tenement*." A real servitude cannot be separated from the dominant tenement. Examples of such servitudes are the right of way, right of support of a building by the adjoining soil, right of access of light from the windows, etc.

A *personal servitude* is one which is vested in an individual because of his personality. Such a right is not attached to any particular tenement. An example of such a servitude is the right of fishing by one person in the pond of another person.

A *positive servitude* is one which entitles the owner to do something. An example of such a servitude is the right to walk across the land of another person. A negative servitude entitles the owner to prevent the servient owner from doing something. The servient owner can be prevented from building his house higher than that of the dominant owner. He can be prevented from obstructing the view, prospect, light or air which is enjoyed by the dominant owner. A positive servitude entitles the owner to do something and the *negative servitude* entitles him to prevent another from doing something. A positive servitude can be lost by non-user but that cannot be the case with a negative servitude. The latter can be lost only if the servient owner infringes the servitude and the dominant owner submits to the same.

Sir John Salmond classifies servitudes as *appurtenant* and *in gross*, and *public* and *private*. *Appurtenant servitudes* are enjoyed by the owner for the time being of land or a house over other piece of land. *Servitudes in gross* are those which are not appurtenant or accessory to any particular land building. Examples of such servitudes are the public right of navigation or fishing, public right of way or the right of pasturage. *Private servitudes* are possessed by certain individuals and *public servitudes* vest in the public at large. Examples of private servitudes are the right to light, the right of way, the right of fishing, etc., possessed by one individual. Examples of public servitudes are the right of the public to pass through a particular field or a house.

Reference may be made to what are called *easements*. In a sense, an easement is the same thing as a servitude. However, servitudes can be divided into easements and *profits a prendre*. Easements include only the private and appurtenant servitudes. An example of an easement is the right of way. *Profits a prendre* includes only the right to derive certain profits from the servient tenement. An example of such a servitude is the right to graze cattle or the right to fish in a pond.

### (iii) Securities

According to Lord Wrenbury, "A security is a possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after whose satisfaction the balance of the property or fund belongs to the grantor. There are two owners and the right of the one has precedence over the right of the other." According to Salmond, "A security is a *jus in re aliena*, the purpose of which is to ensure or facilitate the fulfilment or enjoyment of some other right (usually though not

necessarily a debt) vested in the same person." *A security differs from a surety.* In the case of security, a particular *res* is charged with the debt. In the case of surety, the surety is under an obligation to pay the debt of another if the latter fails to pay the debt of another.

### (a) Mortgage and Lien

According to Salmond, securities are of *two kinds* : *mortgages and liens*. A *mortgage* is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan. A *lien* is the right to hold the property of another person as a security for the performance of an obligation. In the case of a mortgage, the ownership is transferred to the mortgagee, but in the case of lien it remains with the owner. In the case of a mortgage, the mortgagor has the equity of redemption. He can get back the property by paying back the money. Both the mortgagor and the mortgagee possess limited rights in the property. In the case of lien, ownership remains with the debtor but the creditor is given possession of the thing and he is allowed to keep the same till his claim is satisfied. A lien is a security and an accessory right but a mortgage is an independent or principal right. The right of lien vests absolutely in the lienholder. The right of mortgage is more than a security and vests conditionally and not absolutely. As a lien is attached to the debt, it automatically comes to an end on the extinction of the debt. A mortgage is an independent right and can survive even after the extinction of the debt. There is no transfer of a right in the case of a lien but there is a transfer of a right in the case of a mortgage. Any valuable transferable right can be mortgaged. A lien is created by way of encumbrance only but a mortgage is created either by transfer or by encumbrance. In the case of a lien, the debtor has the full legal and equitable ownership. The creditor has only rights and powers like sale, possession, etc., which can safeguard his interest. Where a mortgage is created by the transfer of the right of the debtor to the creditor, the debtor is the beneficial or equitable owner. On the payment of the debt, the mortgagee becomes a mere trustee.

### Kinds of Liens

Liens are of many kinds : possessory lien, right of distress or seizure, power of sale, power of forfeiture and charge. A possessory lien consists in the right to retain possession of chattels or other property of the debtor. The right of distress or seizure consists in the right to take possession of the property of the debtor, with or without a power of sale. Power of sale is a form of security which is seldom found in isolation but is usually incidental to the right of possession conferred by one or other of the two preceding forms of lien. In the case of power of forfeiture, a power is vested in the creditor to forfeit the right encumbered.

Examples of such a lien are the right of re-entry of landlord, the power of the vendor to forfeit earnest money paid by a prospective purchaser, etc. A charge consists in the right of a creditor to receive payment out of some specific fund or out of the proceeds of specific property.

#### (iv) Trust

A trust is an obligation annexed to the ownership of property. It arises out of a confidence reposed in and accepted by the owner or declared and accepted by him for the benefit of another, or of another and the owner. The persons for whose interest trusts are created are the infants, lunatics, unborn persons, etc. According to Paton, "The trust has served in many fields. Firstly, it has been used by associations as a means whereby the group property can be applied to the desired purposes. Secondly, the problem of endowments and of gifts for charitable and religious purposes is made easy, for the property may be vested in trustees for such purposes as the settler desires. Thirdly, the trust has been of great social importance in making possible a facile settlement of family property; the young have been protected from their inexperience; a married woman, through the help of equity, secured a certain measure of economic independence in spite of the common law rule which then vested her chattels in her husband."

#### Modes of acquisition of property

Salmond refers to four modes of acquisition of property and those are possession, prescription, agreement and inheritance.

(1) As regards *possession*, it is the objective realization of ownership. The possession of a material object is a title to its ownership. The *de facto* relation between person and thing brings the *de jure* relation along with it. He who claims a piece of land as his own and has also the possession of the same, makes it good in law also by way of ownership. If a person is in possession of a thing, he cannot be ousted except by one who is the true owner. Even the true owner cannot do so forcibly. He has also to seek the help of law to vindicate his own right. According to Salmond, a thing owned by one person and adversely possessed by another has two owners and those are the absolute owner and the possessory owner. If a possessory owner is deprived of its possession by a person who is other than the true owner, he has the right to recover possession of the same. If property belongs to nobody, the person who captures it and possesses it has a good title against the whole world. In this way, the birds of the air and the fish of the sea are the property of that person who first catches them.

(2) According to Salmond, "*Prescription* may be defined as the effect of lapse of time creating and destroying rights; it is the operation of time as a vestitive fact." Prescriptions are of two kinds: positive or acquisitive prescription and negative or extinctive

prescription. Positive prescription means the creation of a right by the lapse of time. Negative prescription is the destruction of a right by the lapse of time. Lapse of time has two opposite effects. In the case of positive prescription, it is a title of right. In the case of negative prescription, it is a divestitive fact. Long possession creates rights and long want of possession destroys them. If I possess an easement for 20 years without owning it, I begin at the end of that period to own and possess it. Likewise, if I own land for 12 years without possessing it, I cease on the termination of that period either to own or to possess it. The two forms of prescription may coincide so that what one man loses another man gains.

According to Salmond, "The rational basis of prescription is to be found in the presumption of coincidence of possession and ownership, of fact and of right. Owners are usually possessors and possessors are usually owners. Fact and right are normally coincident; therefore, the former is evidence of the latter. That a thing is possessed *de facto* is evidence that it is owned *de jure*. That it is not possessed raises a presumption that it is not owned either. Want of possession is evidence of want of title. The longer the possession or want of possession has continued, the greater is its evidential value." Again, "The tooth of time may eat away all other proofs of title. Documents are lost, memory fails, witnesses die. But as these become of no avail, an efficient substitute is in the same measure provided by the probative force of long possession. So also with long want of possession as evidence of want of title; as the years pass, the evidence in favour of the title fades, while the presumption against it grows ever stronger."

Prescription is not limited to rights in rem. It is found within the sphere of obligations and of property. Positive prescription is possible only in the case of rights which admit of possession. Most rights of this nature are rights in rem. Rights in personam are commonly extinguished by their exercise and cannot be possessed or acquired by prescription. Negative prescription is common to the law of property and obligations. Most obligations are destroyed by the lapse of time. Their ownership cannot be accompanied by their possession. There is nothing to save them from the destructive influence of delay in their enforcement.

Negative prescription may be perfect or imperfect. Perfect prescription is the destruction of the principal right itself. Imperfect prescription is merely the destruction of the accessory right of action. The principal right continues to remain in existence. An example of a perfect prescription is the destruction of ownership of land through dispossession for 12 years. An example of an imperfect prescription is the case of an owner of a chattel who has been out of possession of it for six years. He loses his right

or action for its recovery although he continues to be its owner. If the period of limitation passes, the creditor cannot seek the help of law to recover the debt.

(3) Another method of acquiring property is by means of an *agreement*. According to Paton, an agreement is the expression by two or more persons communicated each to the other of a common intention to affect the legal relations between them. An agreement is the result of a bilateral act. It may be in the nature of an assignment or a grant. An assignment transfers existing rights from one owner to another. A grant connotes the assurance or transfer of the ownership of property as distinguished from the delivery or transfer of property itself. Agreements are either formal or informal. There are some agreements which require registration and attestation of the deed. There are others which are verbal and informal. In the case of Rome, an alienation *inter vivos* (during life-time) required not only the agreement of the parties but also the delivery of possession.

There is a general rule that *the title of the transferee by agreement cannot be better than that of the transferor*. This is due to the fact that no man can transfer a better title than what he himself possesses. However, there are *two exceptions* to this general rule. The transferee gets a good title from a trustee who fraudulently sells the trust property, provided the transferee purchases it for value and without notice of the equitable claim of the beneficiary. The second exception is where the possession of a thing is in one man and the ownership of it is in another, the possessor can transfer in certain cases a better title on the assumption that the possessor is the owner, provided the transferee obtains it in good faith believing him to be the owner. The possessor of a negotiable instrument may have no title to it but he can give a good title to anyone who takes it from him for value and in good faith. Likewise, mercantile agents in possession of the goods can transfer good title, whether they are authorised to sell them or not.

(4) Another method of acquiring property is by means of *inheritance*. When a person dies, certain rights survive him and pass on to his heirs and successors. There are others which die with him. Those rights which survive him are called heritable or inheritable rights. Those rights which do not survive him are called *uninheritable* rights. Proprietary rights are inheritable as they possess value. Personal rights are not inheritable as they constitute merely his status. However, there are certain exceptions to the general rule. Personal rights may not die in the case of hereditary titles. Proprietary rights may be uninheritable in the case of a lease for the life of the lessee only or in the case of joint ownership.

Succession to the property of a person may be either testate or intestate. It may be by means of a will or without a will. If there is a will, succession takes place according to the terms of the

will. If there is no will, succession takes place by the operation of law. If there are no heirs at all, the property goes to the state.

There are three limitations on the power of a person to dispose of his property by means of a will. Those are the limitation of time, limitation of amount and the limitation of purpose.

As regards the limitation of time, a will that controls the devolution of the estate in property is void. According to the Indian law, property cannot be tied up longer for a life in being and 18 years after. The testator must so order the destination of his property that within a certain period the whole of it becomes vested absolutely in some one or more persons, free from all testamentary conditions and restrictions. As regards the limitation of amount, a testator can deal only with a certain portion of his estate and the rest of it has to be allotted by law to the members of his family. According to Mohammedan law, no Muslim can bequeath more than one-third of the surplus of his estate after providing for his funeral expense and payment of debt unless the heirs consent to the same. In the case of Hindu law, the testator can dispose of only his self-acquired property and not the ancestral property. As regards the limitation of purpose, the testator cannot dispose of his property in a way which is against the interests of humanity. He cannot will that his property shall lie waste. He cannot will that all his money will be buried along with his dead body. He cannot will that all his money should be deposited in the sea-bed.

### Theories of Property

According to Hobson, "From the earliest times, the existence and sense of property, the exclusive acquisition and use of material objects that are scarce and desirable, have been important factors in the life of man. Such ownership or property has been desired and striven for, partly for pleasurable consumption, partly as a means to further acquisition of consumable goods, but also for power over human-beings and for the prestige that attaches to ownership and power." Many theories have been put forward to explain the origin of property and its justification.

(1) According to the *natural law theory*, property is based on the principle of natural reason derived from the nature of things. Property was acquired by occupation of an ownerless object and as a result of individual labour. Grotius, Pufendorf, Locke and Blackstone are the great supporters of the theory. According to Grotius, all things originally were without an owner and whosoever captured them or occupied them, became their owners. According to Pufendorf, originally, all things belonged to the people as a whole. There was no individual ownership. By means of an agreement or a pact, private ownership was established. According to Blackstone, "By the law of nature and reason, he who first began to use a thing acquired therein a kind



of transient property that lasted so long as he was using it and no longer ; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. But when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals, not the immediate use only but the very substance of the thing to be used. The theory of occupancy is the ground and foundation of all property or of holding those things in severalty which by the law of nature, unqualified by that of society, were common to all mankind."

(2) The *metaphysical theory* was propounded by writers like Kant and Hegel. According to Kant, "A thing is rightfully mine when I am so connected with it that anyone who uses it without my consent does me an injury. But to justify the law of property, we must go beyond cases of possession where there is an actual physical relation to the object and interference therewith is an aggression upon personality." According to Hegel, property is the objective manifestation of the free personality of an individual. To quote him, "Property makes objective my personal individual will". Property is the object on which a person has the liberty to direct his will.

(3) According to the *historical theory*, private property had a slow and steady growth. It has grown out of collective group or joint property. There were many stages in the growth of individual property. The first stage was that of natural possession which existed independently of the law or the state. The second stage was the juristic possession. Juristic possession was a conception both of fact and law. The last stage of development was that of ownership. It is purely a legal conception having its origin in law. The owner is guaranteed by law the exclusive control and enjoyment of the thing owned by him. According to Sir Henry Maine, "Private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of individuals from the blended rights of the community." Again, "For many years past, there has been sufficient evidence to warrant the assertion that the oldest discoverable forms of property in land were forms of collective property and to justify the conjecture that private property had grown through a series of changes, out of collective property or ownership in common." Again, "Property originally belonged not to individuals, not even to isolated families, but to larger societies composed on the patriarchal model." It was later on that family property disintegrated and individual rights of property came into existence. According to Dean Roscoe, the earliest form of property was group property. It was later on that families were partitioned and individual property came into existence. Similar views are held by Miraglia, the Italian jurist.

(4) Spencer was the propounder of the *positive theory*. He based his theory on the fundamental law of equal freedom.

Property is the result of individual labour. No man has a moral right to property which he has not acquired by his personal effort.

(5) According to the *psychological theory*, property came into existence on account of the acquisitive instinct of man. Every individual desires to own things and that brings into existence property. According to Bentham, "Property is nothing more than the basis of a certain expectation of deriving hereafter certain advantages by a thing by reason of the relation in which we stand towards it. There is no image, no visible lineament which can portray the relation that constitutes property. It belongs not to physics but to metaphysics. It is altogether a conception of mind." Again, "To hold the object in one's hand, to keep it, to manufacture it, to work it up into something else, to make use of it, all or any of these physical circumstances failed to assist in conveying the idea of property. A piece of cloth actually in the Indies may belong to me, but the coat which I have too may not belong to me. The very food which has mingled with my body may be property of another to whom I must account for the price. The conception of property consists in a fixed and settled expectation; in the persuasion of my capacity to derive from the object, hereafter, certain advantages of a character dependent upon the nature of the case." According to Deam Pound, "Moreover, whatever we do, we must take account of the instinct of acquisitiveness and of individual claims grounded thereon."

(6) According to *sociological theory*, property should not be considered in terms of private rights but should be considered in terms of social functions. Property is an institution which secures a maximum of interests and satisfies the maximum of wants. According to Jenks, "The unrestricted right to use, neglect or misuse his property can no longer be granted to any individual and the rights of property should be made conformable to rules of equity and reason." According to Laski, "Property is a social fact like any other and it is the character of social facts to alter. It has assumed the most varied aspects and it is capable of yet further changes."

(7) "Property and law were born together and would die together. Before the laws, property did not exist; take away the laws and property will be no more. That which in a state of nature is no more than a thread becomes, when society is constituted, a veritable cable." According to Rousseau, "It was to convert possession into property and usurpation into a right that law and state were founded. The first man who enclosed a piece of land and said 'This is mine', was the real founder of civil society." Again, "The law of property is the systematic expression of the degree and forms of control, use and enjoyment of things by persons that are recognised and protected by law." Thus, property was the creation of the state,

**Suggested Readings**

- Austin : Jurisprudence.  
Cheshire : The Modern Law of Real Property.  
Lafargue : Evolution of Property.  
Letourneau : Property, its origin and development.  
Noyes, C. R. : Institution of Property.  
Pound, R. : Philosophy of Law.  
Rashdell : Property, its Duties and Rights.  
Vinogradoff : Historical Jurisprudence.  
Weiser, F. : Trust, on the Continent of Europe.

## CHAPTER XIX

### THE LAW OF OBLIGATIONS

#### Definition of Obligation

According to Salmond, "An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right". Obligations are merely one class of duties, namely, those which are the correlatives of rights *in personam*. An obligation is the *vinculum juris*, or bond of legal necessity, which binds together two or more determinate individuals. It includes the duty to pay a debt, to perform a contract, or to pay damages for a tort, but not the duty to refrain from interference with the person, property or reputation of others. The term obligation is the name not only of a duty but also of a correlative right. Looked at from the point of view of the person entitled, an obligation is a right. Looked at from the point of the person bound, it is a duty. Moreover, all obligations pertain to the sphere of proprietary rights. They form a part of the estate of the person who is entitled to them.

According to Paton, an obligation is that part of the law which creates rights *in personam*. According to Kant, an obligation is "the possession of the will of another as a means of determining it through my own, in accordance with the law of freedom, to a definite act." According to Savigny, an obligation is "the control over another person, yet not over this person in all respects (in which case his personality would be desired), but over single acts of his which must be conceived of subtracted from his free will and subjected to our will."

According to Holland, "An obligation, as its etymology denotes, is a tie whereby one person is bound to perform some act for the benefit of another. In some cases, the two parties agree thus to be bound together; in other cases, they are bound without their consent. In every case, it is the law that ties the knot and its untying, *solutio*, is competent only to the same authority."

#### Chose in Action

A technical synonym for an obligation is a chose in action or a thing in action. A chose in action means a proprietary right in personam. An example of a chose in action is a debt or a claim for damages for a tort.

#### Chose in Possession

Choses in action are opposed to choses in possession. In its origin, a chose in possession was any thing or right which was

accompanied by possession and a chose in action was any thing or right of which the claimant has no possession but which he must obtain, if need be, by way of an action at law. Money in the purse of a person is a thing in his possession. Money which is due to a creditor by a debtor is a thing in action.

According to Dias & Hughes, "Choses in action have been defined as all 'personal rights of property which can only be claimed or enforced by action and not by taking physical possession', in short, they are rights *in personam* which are 'proprietary'. Choses in possession mean things capable of physical possession and delivery, *i.e.*, tangible objects." (P. 221, Jurisprudence).

### Kinds of Obligations

From the point of view of the number of persons bound, obligations are of two kinds. Those are simple and solidary.

(1) *Simple obligations* relate to one creditor and one debtor. Ordinarily, obligations are of this type. Even when there are two or more creditors of the same debtor, there is not much difficulty. The creditors are co-owners and they hold either as joint-owners or owners in common.

(2) *Solidary obligations* are those where two or more debtors owe the same thing to the same creditor or creditors. Each debtor is bound for the whole of the obligation and not for a proportionate part. If the two debtors owe a debt in defined shares, there is no solidary obligation but there are two simple obligations. The obligation is solidary only when each is liable for the whole. Examples of solidary obligations are the debts due by partners, liability of joint tortfeasors, debts owed by a principal debtor and guaranteed by a surety or sureties.

English law recognizes *three kinds* of solidary obligations and those are several, joint, and joint and several. (i) Solidary obligations are *several* when there are as many causes of action and obligations with respect to the same debt as there are debtors and each of whom is bound for the whole of the obligation. Examples of several solidary obligations are the principal debtor and a surety for the debt by a contract independent of and subsequent to the one creating the debt, two or more co-sureties independently giving guarantees for the same debt and two or more independent wrong-doers whose acts result in the same damage.

(ii) Solidary obligations are *joint* when there is only one obligation and one cause of action, though there are two or more debtors. The subject-matter or the thing owed is the same. The *vinculum juris* is simple although it binds many debtors to the same creditor. The principal debtor and the surety signing the same bond is an example of a solidary obligation which is joint. If one is discharged, the other debtors are also discharged. An

example of a joint solidary obligation is a partnership debt. If one partner pays the money, all other partners are absolved.

(iii) Solidary obligations are *joint and several* when for some purpose, law treats the obligations as joint while for others it treats them as several. An example of such an obligation is a contractual obligation which is expressly made joint and several by the agreement of the parties. Other examples are the liabilities of those who jointly commit tort or a breach of trust.

### Sources of Obligations

If we classify obligations from the point of view of the sources, we have four such kinds of obligations, *viz.*, contractual obligations, delictal obligations, quasi-contractual obligations and innominate obligations.

(1) *Contractual obligations* are those which are created by contracts or agreements. These obligations create rights in personam between the parties. The rights so created are generally proprietary rights. Sometimes, a contract creates rights which are not proprietary though they are in personam. An example of such an obligation is a promise of marriage. At the beginning, the idea of an obligation was strictly personal. Under the common law, choses in action were not assignable. Later on, negotiable instruments came to be assigned. The Judicature Act of 1873 made all debts and legal choses in action assignable at law. There are still certain rights which cannot be transferred and those are the assignment of a mere right to sue for damages in tort or a right to personal services without the consent of the person bound.

(2) *Delictal obligations* arise from torts. According to Salmond, "A tort may be defined as a civil wrong for which the remedy is an action for damages and which is not solely the breach of contract or the breach of trust or other merely equitable obligations." Delictal obligations are those in which a sum of money is to be paid as compensation for a tort. A tort has a penal element and a remedial element and the same act may be a crime and a tort. However, *a tort is distinguishable from crimes and civil wrongs* in certain respects. A tort is a civil wrong as distinguished from a crime and the sanction is remissible by the injured person. A tort is a special kind of civil wrong and the proper remedy for it is damages and not the civil remedies like injunction, specific performance, restitution of property, payment of a liquidated sum of money by way of penalty or otherwise, etc. No civil wrong is a tort if it is exclusively the breach of contract. The *liability for a breach of contract and liability for torts* are governed by different principles. However, the same act may be both a tort and a breach of contract. This happens in two cases. In the first case, a man may undertake by contract the performance of a duty which lies in him already, independently of any contract. He who refuses to return a borrowed chattel commits a breach of

contract and also a tort. In the second case, a liability in tort arises out of a breach of contract in favour of one who is not a party to the contract. X lends some chattel to Y who hands them over to Z for safe-keeping. Z agrees to do so. The chattel is destroyed. Z is liable for the breach of contract to Y and in tort to X. A tort differs in origin from the breach of trust or other equitable obligations as the former was recognized by common law and the latter only by the Chancery. Even now the distinction is maintained as the principles are not the same in both cases.

A distinction may be made between a *contractual obligation* and a *delictal obligation* or tort. A contract is based on consent but a tort is inflicted against or without consent. Privity between the parties is implied in a contract but that is not so in the case of a tort. In a contract, the right or duty arises from an agreement between the parties. The duty in a contract cannot be enforced by a third party but only by the parties to the contract. In the case of tort, there is a breach of general law and consequently anybody suffering from the acts of another can file a suit. A breach of a contract is a violation of a right in personam. A tort is mostly a violation of a right in rem. There is no place for motive in a breach of contract but motive is taken into consideration in a tort. If there is a breach of contract, damages are in the nature of compensation. In the case of a tort, damages may be exemplary or vindictive in the case of malice or fraud. The measure of damages can be fixed according to the terms of the contract between the parties but in the case of tort, it is not possible to fix the damages with precision. Originally, a tort was recognised in common law but a breach of contract was recognised only by the Court of Chancery.

(3) Quasi-contractual obligations (obligations quasi ex contractu) are such as are regarded by law as contractual though they are not so in fact. These obligations are called by Salmond by the name of "*contracts implied in law*". There are cases in which law departs from the actual facts and implies a contract by *fiction*. A quasi-contractual obligation is something the effect of which resembles the effect of a contract. However, it is to be observed that all implied contracts are not quasi-contracts. An implied contract may be either "*implied in law*" or "*implied in fact*." Although the former is not a true contract, law regards the obligation as if it were in the nature of a contract. The latter is a true contract and is based on the agreement between the parties. A quasi-contractual obligation arises where the law fictitiously attaches a contract. A money decree creates an obligation which is not contractual. There is no agreement to pay. However, the law presumes that there is a duty to pay and also promise to pay. This is a quasi-contractual obligation. If I enter a train, it implies that I agree to pay the railway fare. My obligation is truly a contractual one.

Most of the quasi-contractual obligations fall under two heads. All debts are deemed in theory of common law to be contractual in origin although they may not be so in actual fact. Examples are a judgment-debt, money got by fraud or paid under mistake, etc. A judgment creates a debt which is non-contractual. However, law treats it as falling within the sphere of a contract. According to Blackstone, "Whatever, therefore, the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." According to Lord Esher, "The liability of the defendant arises upon the implied contract to pay the amount of the judgment."

In certain torts, the plaintiff has the choice to treat the obligation which is really a tort as if it were contractual. If A wrongfully sells the goods of B, B can sue A for damages in tort. However, B may elect to waive the tort and sue A instead on a fictitious contract. B can demand from A the payment of money received by him as if he were the agent of B. Here, the law presumes the contract and an implied term to pay. In the same way, if A obtains money from B by deceitful means, B can sue A either in tort for damages for the deceit or on a fictitious contract for the return of the money. X may take the goods of Y on loan and then sell them. X is liable in tort but Y can waive that remedy and sue X for the price of the goods as if X had sold them as the agent of Y. Sections 68 to 72 of the Indian Contract Act deal specifically with quasi-contracts which are not founded on actual promises but where the law presumes a contract between the parties.

There are many *reasons* which have been responsible for the *recognition of fiction in quasi-contractual obligations*. (i) The first reason is that the classification of obligations into contractual and delictal obligations is not exhaustive. Although the remedy of contractual obligations is liquidated damages and of delictal obligations is uncertain damages, yet this cannot be the basis of distinction. In certain torts, damages may be liquidated. This is so in the case of the price of goods wrongfully sold. (ii) The second cause is the desire to supply a theoretical basis for new forms of obligations as established by judicial decision. Legal fictions are of use in assisting the development of law. It is easier for the courts to maintain that a man is bound to pay because he has promised to do so than to lay down for the first time the principle that he is bound to pay whether he has promised to do so or not. (iii) Another cause is the desire of the plaintiffs to obtain the benefit of the superior efficiency of contractual remedies. In the old days of formalism, it was better to sue on a contract than on any other ground. The contractual remedy was better than others. It was better than trespass and other delictal remedies. It did not die with the person of the wrong-doer but was available even against his executors. No wonder, the plaintiffs were allowed to allege fictitious contracts and sue on them.



It is to be observed that any rational system of law is free to get rid of the conception of quasi-contractual obligations. No useful purpose is served by it at the present day. However, it is still a part of the law of England.

(4) *Innominate obligations* are all those obligations which are other than those falling under the heads of contractual obligations, delictal obligations and quasi-contractual obligations. Examples of such obligations are the obligations of trustees towards their beneficiaries and other similar equitable obligations.

### **Suggested Readings**

Dias and Hughes : Jurisprudence.

Paton : Jurisprudence.

Salmond : Jurisprudence.

## CHAPTER XX

### THE LAW OF PROCEDURE

#### Law of Procedure and Substantive Law

According to Sir John Salmond, "The law of procedure may be defined as that branch of the law which governs the process of litigation." It is the law of actions and includes all legal proceedings whether civil or criminal. All the residue is substantive law. It relates not to the process of litigation but to its purpose and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks. Procedural law deals with the means and instruments by which those ends can be achieved. It regulates the conduct and relations of courts and litigants in respect of the litigation itself. Substantive law determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings. Substantive law regulates the affairs controlled by such proceedings. What facts constitute a wrong is determined by substantive law. What facts constitute proof of a wrong is a question of procedure. The first relates to the subject-matter of litigation and the second relates to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law. Whether an offence is punishable summarily or only on indictment is a question of procedure. The abolition of capital punishment is an alteration of the substantive law. The abolition of imprisonment for debt is merely an alteration in the law of procedure. The reason is that punishment is one of the ends of the administration of justice but imprisonment for debt is merely an instrument to enforce payment. Substantive law relates to matters outside the courts but procedural law deals with matters inside the courts.

It has rightly been pointed out that "*the law of procedure is not the same thing as the law of remedies.*" The distinction that substantive law defines rights and procedural law determines remedies is not a right one. The reason is that there are many rights which belong to the sphere of procedure. Examples are a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party, etc. Moreover, rules defining the remedy may be as such a part of substantive law as those defining the right itself. No one can call the abolition of capital punishment a change in the law of criminal procedure. The substantive part of criminal law deals not only with crimes but also with punishments. Likewise, in civil law, the rules regarding the measure of damages pertain to substantive law. The

rules determining the classes of agreements which can be specifically enforced are substantive law in the same way as those rules which determine the agreements which can be enforced at all. To quote Salmond, "To define procedure as concerned not with rights, but with remedies, is to confound the remedy with the process by which it is made available." The real distinction between substantive law and procedural law is that one relates to the definition of rights and remedies and the other to the process of litigation.

According to Salmond, *the difference between substantive law and procedural law is one of form and not of substance*. A rule belonging to one class may, by a changed form, pass over into the other without materially affecting the practical issue. In legal history, such changes are frequent. Salmond refers to *three classes* of such cases.

(a) As regards the first class, an exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence is that a contract can be proved only by a writing. This corresponds to a rule of substantive law that a contract is void unless it is reduced to writing. In one case, the writing is the exclusive evidence of title. In the other case, the writing is a part of the title itself. For most purposes, the distinction is one of form and not of substance.

(b) As regards the second class, a conclusive evidential fact is equivalent to and tends to take the place of the fact proved by it. All conclusive presumptions pertain in form to procedure but in effect to substantive law. Procedural law says that a child under the age of 8 cannot have a criminal intention and substantive law exempts such a child from punishment. It is a conclusive presumption of law that the acts of a servant are done with the authority of his master. This is a rule of procedure. However, there is also the substantive law which makes the employer liable for the acts of his employees. Originally, a bond was considered as a conclusive proof of the existence of the debt. At present, it is considered to be creative of a debt. Thus, it has passed from the domain of procedure into that of substantive law.

(c) The limitation of actions is the procedural equivalent of the prescription of rights. The legal procedure destroys the bond between right and remedy and substantive law destroys the right itself. The legal procedure leaves an imperfect right subsisting. Substantive law leaves no right at all. However, their practical effect is the same in both cases although the forms are different.

According to Pollock, "The most important branches of the law of procedure are the rules of pleading and the rules of

evidence. It is obvious that, if litigation is to be concluded at all, a court of justice must have some kind of rule or usage for bringing the dispute to one point or some certain points, and for keeping the discussion of contested matters of fact within reasonable bounds. Rules of pleading are those which the parties must follow in informing the court of the question before it for decision, and in any case of difficulty enabling the court to define the question or questions. Rules of evidence are those by which the proof of disputed facts is governed and limited. In English practice the sharp distinction between the office of the court as judge of the law and the jury as judge of the facts has had a profound effect in shaping and elaborating both classes of rules. Indeed, it may be said to have created our peculiar law of evidence, for where a judge deals freely with both law and facts, as in the old Court of Chancery and its successor the Chancery Division, no need is felt, except as to definite requirements of form, for laying down hard and fast rules outside the general tradition of judicial discretion. Pleading, down to our own days, was a highly artificial system of which one object, sought by advocates for both good and bad reasons, was to obtain clear decisions of the court on points of law disengaged from contest on the facts. In the matter of evidence it was the interest of the court, the profession, and the public alike to keep the jury within the bounds of the law as laid down to them by the judge, to prevent them from being influenced by mere gossip, and to guard the independence of witnesses while providing effectual means for testing their credibility. These objects were not attained in either case without drawbacks. Rules intended only for guidance were handled as if they were ends in themselves, and used as mere counters in the game of skill between advocates. The intricacies of pleading became a scandal, and mischief of the like sort, though comparatively slight, left its mark on the rules of evidence also. Pleading has now been reduced to the simplest forms yet not always to very simple practice—in England and many other English-speaking jurisdictions; but our law of evidence, in the opinion of those who have studied it most, is still too complicated." (Jurisprudence and Legal Essays, Pp. 43-44).

### **Elements of Judicial Procedure**

The normal elements of judicial procedure are five in number, *viz.*, summons, pleading, proof, judgment and execution. The object of the summons is to secure for all parties interested an opportunity of presenting themselves before the court and making their case heard. Pleadings bring to light the matters in issue between the parties. In civil law, proceedings consist of the plaint, written statement and the replication. In criminal law, the proceedings include the complaint and the written statement, if any. Proof is the process by which the parties

supply the court with the data necessary for the decision of the case. A judgment is a decision of the court. It may be in the form of a decree or an order. Execution is the process by which the court enforces a decree. It is the act of completing or carrying into effect the judgment. In the stage of execution, any property can be attached or sold. The debtor can be arrested and put in prison. A receiver can be put in charge of property.

### **Definition of Evidence**

According to Salmond, evidence may be defined as any fact which possesses probative force. One fact is evidence of another when the existence of the former creates a reasonable belief in the existence of the other. The quality by virtue of which it has such an effect is called probative force.

According to Phipson, "Evidence, as the term is used in judicial proceedings, means the facts, testimony and documents which may be legally received in order to prove or disprove the fact under enquiry."

According to Taylor, evidence includes "all the legal means exclusive of mere argument, which tend to prove or disprove any fact, the truth of which is submitted to judicial investigation."

According to Section 3 of the Indian Evidence Act, evidence means and includes all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry and all documents produced for the inspection of the court.

The terms evidence and proof are not synonymous. Proof is the effect of evidence. Proof consists of that fact which either immediately or mediately tends to convince the mind of the truth or falsehood of a fact. Proof is the effect of evidence and evidence is the medium of proof. Evidence is the foundation of proof in the same way as a house is built out of bricks and mortar. All evidence is not proof.

### **Kinds of Evidence**

(1) Evidence is of many kinds. It may be judicial or extra-judicial. *Judicial evidence* is that which is produced before the court. It consists of all facts which are actually brought to the knowledge and observation of the court. *Extra-judicial evidence* is that which does not come directly under judicial cognisance. However, it is an important intermediate link between judicial evidence and the fact requiring proof. Judicial evidence includes all evidences given by witnesses in the court, all documents produced in the court and all things personally examined by the court. Extra-judicial evidence includes all

evidential facts which are known to the court only by way of inference from some form of judicial evidence. Testimony is extra-judicial when it is judicially known only through the relation of a witness who heard it. If a confession of a guilt is made to a court of law, it is judicial evidence. Such a confession is extra-judicial if it is made somewhere else but is proved before a court of law by some form of judicial evidence. If a document is actually produced in the court, it is judicial evidence. If a document is known to the court only through a copy or the report of a witness who has read it, it is extra-judicial evidence. It is to be observed that in every case, some judicial evidence is absolutely essential but extra-judicial evidence may be there or may not be there. When extra-judicial evidence is present, it forms an intermediate link between the principal fact on the one hand and judicial evidence on the other. Judicial evidence requires mere production and extra-judicial evidence stands itself in need of proof.

(2) Evidence may be *personal or real*. Personal evidence is also called testimony and includes all kinds of statements regarded as possessed of probative force. Personal evidence is the most important form of evidence. It may be oral or written and judicial or extra-judicial. Real evidence includes the residue of evidential fact. Anything which is believed for any other reason than that someone has said so, is believed on real evidence. Real evidence may be judicial or extra-judicial. According to Bentham, real evidence denotes "all evidence of which any object belonging to the class of things as the source, persons being included in respect of such properties as belong to them in common with things." In this sense, real evidence may be immediate or reported.

(3) Evidence may be *primary or secondary*. Primary evidence is immediate evidence of the principal fact. A document is the primary evidence of its contents. Secondary evidence is such that a more immediate evidence than it exists. A copy of a document or oral evidence is secondary evidence of the contents of the document. Secondary evidence should not be allowed when primary evidence is available as it is inferior to primary evidence.

(4) Evidence may be *direct or circumstantial*. Direct evidence is testimony relating immediately to the principal fact. All other evidence is circumstantial. Direct evidence is the testimony of a witness relating to the precise point in issue. It is evidence of a fact perceived by a witness with his own senses. If A says that he saw B committing the murder, the evidence of A is direct evidence. Circumstantial evidence is that evidence which relates to a series of facts other than the fact in issue but which are closely connected with that fact in such a way that it leads to some definite conclusion. According to Keeton,

circumstantial evidence is the evidence of facts other than those of which proof is required, but from the existence of which proof of desired facts can necessarily be inferred. X states that he saw Y leaving the place where Z was murdered and that Y had blood-stained dagger in his hand. The evidence of X is circumstantial evidence. Law requires that circumstantial evidence should be used with caution.

#### **(5) Original and hearsay evidence**

Original evidence is that which possesses an independent probative force of its own. The witness states what he has seen or heard with his own eyes or ears. Hearsay evidence is not based on the personal knowledge of the witness. He makes the statement on the basis of the statement of another person. Two factors have to be taken into consideration in this connection. The person giving the evidence may be suppressing facts. It is also possible that the person who originally made the statement may not have been honest. Ordinarily, hearsay evidence is not accepted. However, there can be certain exceptions to the general rule.

#### **Production of evidence**

The law of evidence is concerned with the production of evidence and its valuation. As regards the production of evidence, many rules have been laid down for the production of documents and the examination of witnesses. The object of these rules is to avoid unnecessary expense, delay and vexation. Considerations of public policy also play their part. There are certain witnesses who cannot be forced to disclose facts which are known to them and which are material to the point in issue. A reference to the Indian Evidence Act shows that a judge or a magistrate cannot be forced to answer any question regarding his own conduct except under the special orders of a superior court. Communications during marriage are also privileged. Neither the husband nor the wife can be compelled to disclose any communication made to him or her during marriage. The unpublished records of the state are also privileged. They cannot be produced by any person except with the permission of the head of the department concerned. Likewise, the official communications are also privileged. If the public interests so demand, no public officer can be compelled to disclose communications made in official confidence. No magistrate or police officer can be compelled to disclose the source of his information regarding an evidence. Professional communications are also privileged. No lawyer can be forced to disclose the communications between him and his client. However, this can be done with the consent of the client. No accused person can be compelled to answer any question which is likely to incriminate him. Even if a confession is to be made by an accused person, that must be done absolutely

voluntarily. There should be no inducement, threat or promise. Any violation of this rule makes a confession useless in the eye of law. Witnesses are called upon to take an oath before making their statements. The object of the oath is to find out the truth. However, in modern times, the sanctity of oath has been completely lost and the whole affair has become mechanical. Any party in litigation which puts trust in an oath is bound to come to grief.

### **Probative value of evidence**

When all the evidence has been produced, the same has to be valued. Many rules have been laid down to weigh the value of the evidence produced in the court.

(1) *Conclusive proof* consists of facts which have such probative force that they cannot be contradicted. When one fact is declared by law to be the conclusive proof of another fact, the court shall, on proof of one fact, regard the other as proved. It shall not allow evidence to be produced for the purpose of disproving it. Conclusive presumptions are inferences which must be drawn and cannot be allowed to be overruled by any evidence howsoever strong it may be. Section 112 of the Indian Evidence Act provides that if a child is born during wedlock or within 280 days after the dissolution of marriage between the mother and the father, the mother remaining unmarried, it shall be conclusive proof of the legitimacy of the child. Likewise, Section 80 of the Indian Penal Code provides that a child under the age of 7 is presumed by law to be incapable of committing any offence.

(2) *Presumptive proof* means such proof which may be considered sufficient if there is no other proved fact to the contrary. In such a case, a rebuttable presumption is raised. The presumption can be proved to be wrong by contrary evidence. Unlike conclusive proof, the court allows the contrary evidence to be led to disprove the presumption.

(3) If law prescribes a certain amount of evidence to be absolutely necessary and the evidence produced does not come up to the necessary standard, the evidence is considered to be insufficient. The courts are not allowed to act upon such evidence. According to the English law, the evidence of one witness is not sufficient to hold a person guilty of the offence of treason. There is no such express rule of law on this point in India. A will requires to be attested by two witnesses and if a will has been attested only by one witness, no court will take cognizance of it.

(4) In the case of *exclusive evidence*, certain facts alone are recognised as being the only evidence of certain other facts. No other evidence is permitted by law. The execution of a will can be proved only by the testimony of one attesting witness. However, the case is otherwise if the attesting witnesses are dead. If a contract, grant or assignment is reduced to writing or is required



by law to be made in writing, in that case only the writing itself is admissible to prove the contract, assignment or grant. It is a case of exclusive evidence.

(5) There are certain facts which have absolutely no probative force at all. They can neither be produced in the court nor acted upon. No court can take cognizance of such non-essential facts. For example, hearsay evidence is no evidence and is ordinarily excluded. Likewise, the bad character of the accused is ordinarily irrelevant in criminal proceedings. It becomes relevant only if evidence has been given to show that he possesses a good character.

### **Suggested Readings**

- Diamond : Primitive Law.
- Jackson : Machinery of Justice in England.
- Mullins, C. : In Quest of Justice.
- Paton : Jurisprudence

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